January 1938

AMERICAN BAR ASSOCIATION JOVRNAL

VOL. XXIV NO. 1

Section of Administration Launches Program on Wide Front

HON. ARTHUR T. VANDERBILT

Declaratory Rulings

HON. HERMAN OLIPHANT

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WILL SHAFROTH

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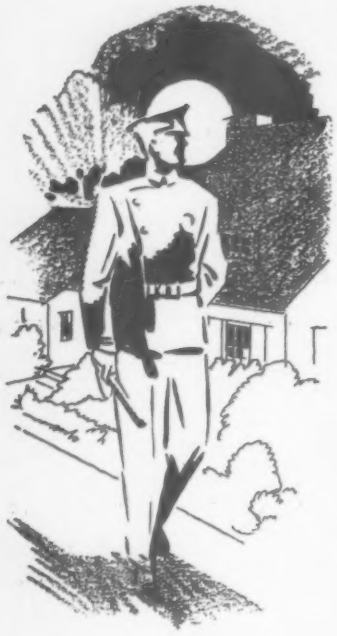

Keeping Watch

In spite of the vigilance of officers of the law, burglaries, thefts and robberies continue at an alarming rate. Occupants of city apartments and residents of suburban homes are alike menaced by this constant threat of loss. Not only silverware and jewelry but furs, clothing and household goods of every description are likely to be stolen.

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(Note: The asterisks in front of certain titles indicate that these are articles on the subject.)

NOTICE BY THE BOARD OF ELECTIONS

THE following states will elect a State Delegate for a three-year term in 1939:

Arizona	Nebraska
Connecticut	New Jersey
District of Columbia	Oklahoma
Illinois	South Carolina
Iowa	South Dakota
Maine	Texas
Michigan	Washington
Mississippi	Wyoming
Montana	Puerto Rico

For all states, with the exception of Puerto Rico, this is the second election for State Delegate which has taken place under the Constitution adopted by the Association at Boston. At the Cleveland meeting the Constitution was amended to provide for the election of a State Delegate to represent the Territory of Puerto Rico (Article II, and Article V, Section 4). This is therefore the first election for State Delegate to take place in Puerto Rico.

Nominating petitions must be filed with the Board of Elections not later than February 10, 1939. Forms of nominating petitions may be secured from the headquarters of the American Bar Association, 1140 North Dearborn Street, Chicago. Nominating petitions in order to be timely must actually be received at the headquarters of the Association before the close of business at 5:00 P. M. on February 10, 1939.

Attention is called to Section 5, Article V, of the Constitution, which provides:

"Not less than one hundred and fifty days before the opening of the annual meeting in each year, twenty-five or more members of the Association in good standing and accredited to a State (or the territorial group) from which a State Delegate is to be elected in that year, may file with the Board of Elections, constituted as hereinafter provided, a signed petition (which may be in parts), nominating a candidate for the office of State Delegate for and from such State (or the territorial group.)"

Unless the person signing the petition is actually a member of the American Bar Association in good standing, his signature will not be counted. A member who is in default for the payment of dues is not a member in good standing.

Each nominating petition must be accompanied by a typewritten list of the names and addresses of the signers as they appear upon the petition.

Ballots will be mailed to the members accredited to the States, in which elections are to be held, within thirty days after the time for filing nominating petitions expires.

EDWARD T. FAIRCHILD,
Chairman, Board of Elections.

Published Monthly by American Bar Association at 1140 North Dearborn Street, Chicago, Illinois
Entered as second class matter Aug. 25, 1930, at the Post Office at Chicago, Ill., under the Act of Aug. 24, 1912.
Price: Per Copy, 25c; Per Year, $3; To Members, $1.50.

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JANUARY 1938
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CURRENT EVENTS

First Proctor Presents First Annual Report

THE Proctor of the Bar of the Eighth Judicial District of New York State, holder of a unique office created not long since by the State Legislature, has submitted his first Annual Report. Mr. Karl A. McCormick is the Proctor.

Experience gained so far, he says, prompts but two concrete suggestions. The first is that it is necessary for the Bar of the State and Nation to provide some means for a better understanding of its administration and its functions—some points of contact between the profession and the public in each judicial district. The second is that there should be a marked decrease in the numbers admitted to the law schools and a much better practical preparation for service to the public for those whom the public undertakes to fit for a career at the Bar.

The broad purpose of the office, as conceived by those who sponsored its creation, the report states, was to raise the standing of the Bar in the opinion of the public and to combat the hostility of the laymen against the legal profession. The causes of this hostility may be numerous, but two or three main reasons seems apparent.

The first is the serious overcrowding of the profession, which is resulting in economic pressure on large numbers of the Bar, with the growing difficulty of maintaining high standards of ethical conduct in many cases. The second is the unauthorized practice of the law by lay agencies which misinform the public and seek to render many kinds of legal services to the detriment of the public, all of which tends to bring the profession into disrepute. The third is the fact that many of the new lawyers who are crowding into the Bar are not fitted by ideals and purposes to promote the best interests of society.

The report then proceeds to give the Proctor's work in detail. The first big job of the office was to acquaint lawyers in the Eighth Judicial District with the purpose of the office, and to do this the Proctor met with every one of the twelve Bar Associations in the District. In the beginning no effort was made to acquaint the public with the work mapped out for the Proctor, but strangely enough, the laymen from the very first commenced to find out and make use of it. Many of them brought their complaints to the office, most of them of a type that could not be handled by a grievance committee of a Bar Association. The trouble in most cases was a misunderstanding between lawyer and client, and the Proctor did all he could to straighten out these misunderstandings.

This particular kind of experience gave an excellent opportunity for observing the attitude of laymen toward lawyers and furnished an impressive lesson as to the necessity of bridging the gap between the legal profession and the public. It becomes more and more evident, the report states, "that the profession of the law badly needs such a medium not only to inform the public of its real functions but to smooth out the misunderstandings that are bound to arise in the many relationships between attorney and client. This function of this office seems to be one of its greatest opportunities for value to both the public and the profession."

The report goes into detail with regard to the Proctor's investigation and report on some seventy-five or eighty applications for admission to the Bar in the course of a year, some of them coming from various parts of the country. This was in connection with its duty of cooperation with the Committee on Character and Fitness. It also spoke of the work in supplementing the report of the National Conference of Bar Examiners, as far as possible, in the case of the increasing numbers of lawyers who apply for admission from other States.

The office, we are told, is also accumulating information about prospective applicants which should be of considerable service. The various law schools where boys and girls from the Eighth Judicial District are attending school have been asked to have students fill out cards giving some information about themselves. The law schools are giving their cooperation and in the coming years the office will have complete files. In this way it hopes to be able to keep in touch with students who will eventually be applicants for admission to the Bar of the District.

"In another way," the report continues, "the office has attempted to be of service to those about to be admitted to the Bar. Each candidate is talked with separately before appearing before the Committee, with the object of giving the new lawyers some idea of the profession of which they are about to become members." In addition, the office has had many interviews with boys and girls in high schools and colleges and with parents who are thinking of urging a legal education upon their sons or daughters. It has also had much correspondence with such persons, with the object of supplying them with such information as they desire.

In dealing with the subject of the unauthorized practice of the law, a study of the existing law on the subject in New York was made, and a further study in a large number of other States was undertaken. It was found that New York is one of the few States in the Union where the highest court has decided it has no inherent power over those who assume to practice law without a license from the Court. Furthermore, with the law as it was when the office began to function, it was apparent that very little, if any, progress could be made in the field of unauthorized practice.

Many conferences were held and Mr. Edwin N. Otterbourg, Chairman for many years of the Committee on Unauthorized Practice of the Law of the New York County Lawyers Association, was especially helpful with advice and counsel. As a result of these studies, the office presented a proposed law on the subject to the 1937 Legislature, which was passed and became Chapter 311 of the Laws of 1937. It provided for an amendment to Section 88 of the Judiciary Law, Subdivision 2, and gave the Supreme Court all necessary powers.

Under the head of "Other Ways in Which Service Has Been Rendered,"

the Proctor's report listed its assistance in cases of various kinds of disputes that occur between members of the Bar. Then, again, many lawyers, old and young, have sought the counsel and advice of the office in various matters of professional nature. In addition, considerable effort is constantly expended to gather as much information as possible regarding the economic condition of the profession, especially in the Eighth District. This information is valuable in assisting young students and their parents in deciding whether to take up the law as a vocation.

Association of American Law Schools Holds Meeting

THE Association of American Law Schools held its Thirty-fifth Annual Meeting on December 29, 30 and 31, at Chicago. The President's address was delivered by Dean Lloyd K. Garrison. It was an extremely practical address, dealing with suggestions as to how the law schools could render better service to the Bar and the students. Among other things, he spoke of better means of controlling admission and surveys in different localities as a means of securing better information for advice as to placement.

President Garrison also broached a tentative plan to bring into the law schools a group of lawyers in practice, who would be known as "preceptors" and who would help stimulate the interest of the students. These preceptors were not intended to be teachers, but it was thought that, by informal conferences, possibly with regard to books or other matters of professional interest, they would be able to interest the students and also give them some idea of the sort of men the leaders of the Bar are.

One of the most interesting sessions was on Thursday. It was given over to a symposium on stock exchange legislation by the Round Table Conference on Public Law. Three points of views were presented. Mr. Dean K. Worcester, Executive Vice-President of the New York Stock Exchange, spoke of the practices, customs and ways of doing business of such organizations, with particular emphasis on the London and New York exchanges. Mr. David Saperstein, recently Director of the Trading and Exchange Division of the Securities and Exchange Commission, gave an idea of what the Securities and Exchange Act meant, and discussed various controversial provisions. Mr. William H. Jackson, of the firm of Carter, Ledyard and Milburn, Counsel to the New York Stock Exchange, pointed out difficulties in the Act from the criminal law standpoint. Certain provisions were entirely too vague to permit of enforcement, he said. He especially criticised the psychological test involved in the definition of "manipulation."

One of the most interesting things done, from the organization standpoint, was the creation of the office of "President-Elect." The object, of course, was to insure that the succession to the presidency would fall to one who had been given an opportunity of familiarizing himself with the duties of the position. The proposed amendment was recommended by the Executive Committee and adopted by the meeting.

A long-continued discussion with regard to granting the degree of Doctor of Jurisprudence was ended, for the time at least, by the rejection of a committee report which recommended that only a Bachelor's degree be granted at the end of the regular undergraduate law course. A majority of the members appeared to hold the view that the matter might well be left to the discretion of the Law Schools.

At the fourth session, on Thursday afternoon, Hon. Arthur T. Vanderbilt, President of the American Bar Association, delivered an address in which he emphasized the necessity of the maintaining of high standards of admission to the Bar and criticized certain features of legal education.

The program for the general sessions and round tables was carried out as outlined in the advance notice sent to members. At one of the sessions a special tribute was paid to Professor Joseph E. Beale, who will retire at the close of the present school year, after having taught forty years on the Harvard Law School Faculty.

Dean Herschel W. Arant, of the Law School of the University of Ohio, was elected President, and Prof. Wilbur Cherry, of the Law School of the University of Minnesota, was chosen President-Elect for the coming year.

Standards Adopted in Arizona

ON December 11 the Supreme Court of Arizona followed the recommendation of the Board of Governors of the State Bar, of the annual meeting of the State Bar Association and of the Judicial Council by adopting the following rule:

"Beginning with the first bar examination to be held in the year 1940, no persons shall be entitled to take an examination for admission to the State Bar of Arizona unless such person shall have graduated from a law school on the approved list of the American Bar Association, or shall have prior to the 11th day of December, 1937, registered with the Committee on Examinations and Admissions of the State Bar of Arizona, or enrolled in a law school approved by the Committee and otherwise be entitled to take the examination under the rules in force prior to the approval of this rule by the Supreme Court of Arizona."

Arizona thus becomes the thirty-fifth State to adopt the two-year college requirement or its equivalent for substantially all applicants, and the fourth jurisdiction to require graduation from a law school approved by the American Bar Association as a prerequisite to the right to take the bar examinations. The Territory of Hawaii, New Mexico and Nebraska also have this requirement while there are some twelve other States which recognize law school study only if taken in an approved school.

Vanderbilt Law School to Have Special Ceremony

THE Law School of Vanderbilt University has arranged a special program for the inauguration of Chancellor O. C. Carmichael, who will succeed retiring Chancellor J. H. Kirkland. This is the first time in forty-four years that Vanderbilt has had a new Chancellor, and the Law School decided to mark the event with a special ceremony. Its program will be presented Friday afternoon, February 4, 1938, Chief Justice Grafton Green presiding.

There will be an address by Hon. Arthur T. Vanderbilt, President of the American Bar Association, on "Trends in Pre-Legal and Legal Education." Dean Herschel Whitfield Arant, of the Ohio State University Law School, will give a "Survey of Legal Education in the South." Hon. Henry Upson Sims, former President of the American Bar Association, will speak on "The Practitioner's View of Current Trends in Legal Education"; and this will be followed by a discussion participated in by Mr. Forrest Andrews, of Knoxville, Mr. George H. Armistead, Jr., of Nashville, President of the Tennessee Bar Association, and Mr. Walter P. Armstrong, of Memphis, former President of the Tennessee Bar Association.

Nominating Petitions

TO THE BOARD OF ELECTIONS OF THE AMERICAN BAR ASSOCIATION:

We, the undersigned, members in good standing of the American Bar Association, accredited to the State of Georgia, hereby nominate John M. Slaton for the office of State Delegate of the American Bar Association for and from the State of Georgia, to be elected in 1938 for a term of two years.

Respectfully,

E. Smythe Gambrell, Marion Smith, Granger Hansell, R. W. Crenshaw, John H. Boman, Jr., Philip H. Alston, Jr., Henry J. Miller, Wm. B. Spann, Jr., Wm. Hart Sibley, Philip H. Alston, Shepard Bryan, Grover Middlebrooks, R. Emerson Gardner, Leonard Haas, Alex. W. Smith, Jr., J. M. B. Bloodworth, Ralph R. Quillian, W. Colquitt Carter, Hamilton Lokey, Bruce F. Woodruff, Arthur G. Powell, Harllee Branch, Jr., John L. Tye, Jr., Charles S. Reid, Max Goldstein, James K. Rankin, James N. Frazer, Elbert P. Tuttle, Joseph B. Brennan, W. A. Sutherland, Frank C. Tindall, Douglas W. Matthews, Inman Brandon, Morris Brandon, Jr., Welborn B. Cody, Louis Regenstein, Jr., Harold Hirsch, D. F. McClatchey, Jr., M. E. Kilpatrick, and A. S. Clay, of Atlanta;

W. M. Fulcher, Lansing B. Lee, Bryan Cumming, James E. Harper, Joseph B. Cumming, James M. Hull, James S. Bussey, Edwin D. Fulcher, and George B. Barrett, of Augusta;

Frank D. Foley, J. Q. Davidson, Theo. J. McGee, R. M. Arnold, J. Madden Hatcher, of Columbus;

Joseph G. Collins, A. C. Wheeler, of Gainesville;

D. R. Cumming, L. P. Goodrich and Wm. H. Beck, of Griffin;

Scott Russell, A. O. B. Sparks, Bruce C. Jones, John B. Harris and C. Baxter Jones, of Macon;

W. S. Mann, and George H. Harris, of McRae;

Rowell C. Stanton, Barry Wright and Graham Wright, of Rome;

A. B. Lovett, Julian F. Corish, Henry B. Brennan, Robert M. Hitch, Jr., W. W. Douglas, Edward C. Brennan, David S. Atkinson, Alex R. Lawrence, Edmund H. Abrahams, J. C. Hester, Jacob Gazan, Morris H. Bernstein, John J. Hennessy, Edward A. Dutton, H. Wiley Johnson, T. M. Cunningham, George O'Donnell, James M. Rogers, William L. Clay, James P. Houlihan, Jr., George T. Cann, Andrew A. Smith, O. E. Bright, John J. Bouhan, Ernest J. Haar, H. Sol. Clark and Robert M. Hitch, of Savannah;

W. W. Alexander of Thomasville; Larry E. Pedrick, Leon A. Wilson, and J. D. Blalock, of Waycross; and J. N. Rainey of Winder.

To the Board of Elections of the American Bar Association:

The Undersigned hereby nominate Sylvester C. Smith, Jr., of Phillipsburg, N. J., for the office of State Delegate for and from New Jersey, to be elected in 1938 for a term of one year:

Arthur T. Vanderbilt, G. Dixon Speakman, Marshall Crowley, Martin B. O'Connor, Willard G. Woelper, O. Blake Willcox, Frederick W. Hall, H. Edward Toner, Paul Benedict, Joseph Harrison, Lawrence Friedman, Louis B. Englander, Philip J. Schotland, John V. Laddey, Ralph A. Villani, Nathan L. Jacobs, David Stoffer, William A. Consodine, Paul M. Strack, Milton M. Unger, Charles M. Myers, Alexander Waugh and L. P. Kristeller, of Newark;

W. J. Morrison, Jr., L. Stanley Ford, Guy Tobler, Horace F. Banta, and W. DeLorenzo, of Hackensack;

Wm. D. Lippincott, Ralph W. Wescott, D. T. Stackhouse, Samuel P. Orlando, Louis B. LeDuc, Edward A. Tanski, Julius Sklar, Howard G. Kulp, Jr., Wm. T. Boyle, M. H. Diverty, Frank T. Lloyd, Jr., Robert J. T. Paul, and Morse Archer, Jr., of Camden;

Leroy B. Huckin, of Englewood, Edwin C. Caffrey, of South Orange; V. Claude Palmer, of Moorestown; Samuel M. Shay, of Merchantsville, and Emma E. Dillon, of Trenton.

To the Board of Elections of the American Bar Association:

The Undersigned hereby nominate Conrad E. Snow, of Rochester, New Hampshire, for the office of State Delegate for and from the State of New Hampshire, to be elected in 1938 for a term of two years:

Warren W. James, Berlin; Francis W. Johnston, Claremont; Willoughby A. Colby, Fred C. Demond, Allen Hollis, Carl C. Jones, Harry F. Lake, Donald Knowlton, Thomas L. Marble, Elwin L. Page, Jonathan Piper, Frank J. Sulloway, Robert W. Upton, Edward K. Woodworth, Alexander Murchie, Robert C. Murchie, of Concord; John Scammon, Exeter; John E. Allen and Chester B. Jordan, of Keene; Theo S. Jewett, Thomas P. Cheney, Laconia; Fred C. Cleaveland, Lancaster; Robert P. Booth, Oliver W. Branch, Ralph E. Langdell, John R. McLane, William J. Starr, Winthrop Wadleigh, Peter Woodbury and Louis E. Wyman, of Manchester; George M. French and Robert B. Hamblett, of Nashua; Jesse M. Barton, of Newport; Preston B. Smart, Ossipee; Arthur E. Sewall and Jeremy R. Waldron, of Portsmouth; Edgar M. Bowker, of Whitefield; William J. Britton, of Wolfeboro.

Washington Letter

A Precedent as to Public Accountants

ONE case which stands as a precedent as to the responsibility of public accountants, since the Supreme Court has refused certiorari is O'Connor, et al. v. Ludlam, et al., 92 F. (2d) 50.

Investors had sought by an action for deceit to recoup their losses in a bankrupt company from the members of a firm of certified public accountants because of what was said to be a "fraudulently false and misleading" balance sheet, prepared by the accountants, which had been used in selling the company's preferred stock to the public. The defendants prevailed in the trial court.

The appellate court concluded it was not error for the trial court to decline to point out with particularity how to apply general rules for determining whether representations were false and made with fraudulent intent, this being held with respect to the issue of whether the balance sheet had disclosed trust funds to be such. It was held to be a question for the jury whether a statement in the balance sheet was made in good faith, viz., the statement that certain notes and accounts receivable were secured when, as a matter of law, they were not secured, the defense having been that the error was due to an honest misconception of the legal effect of a document.

The Circuit Court of Appeals, Second Circuit, held, in view of the issue as to the accountants' intent, that the trial court in his instructions had made sufficient reference to the failure of the balance sheet to show that notes listed as assets were those of subsidiary or affiliated companies, when he referred to the conflicting testimony of experts as to whether good accounting practice required such showing of different ownership of the notes. And it was concluded that, even if it were an abuse of good accounting practice to omit contingent liabilities from the balance sheet, the accountants would not be

(*Continued on page* 84)

SECTION OF JUDICIAL ADMINISTRATION LAUNCHES PROGRAM ON WIDE FRONT

At Last Task of Bringing Administration of Justice in Line with Needs of Twentieth Century Is Seriously Undertaken—Chairmen of Seven Section Committees Dealing with Different Phases of Judicial Administration Hold Meeting in New York City—Seven Advisory and Consulting Committees Appointed Representing Each State, on Recommendation of State Delegates—State and Local Bar Associations Asked to Appoint Cooperating Committees—Every Lawyer Desiring to Help Is Urged to Communicate with Appropriate Committees from His Own State

By Hon. Arthur T. Vanderbilt
President of the American Bar Association

THE name of the Judicial Section was changed at the Kansas City meeting to the Section of Judicial Administration. One of our veteran members asked me at the time what the object of the change was. When I explained that it was to give point and emphasis to the real purpose of the Section, he looked at me quizzically and, shaking his head slowly and dubiously, inquired if we were expecting to get any real work out of the judges. And my friend had had a distinguished career on the bench.

If my friend could have attended the meeting of the committee chairmen of the Section at the University Club in New York on December 14th his doubts would have been dispelled. Judge John J. Parker, the Chairman of the Section, had created seven committees dealing with different phases of judicial administration, principally on the civil side, and had designated as the heads of these committees lawyers and judges of outstanding reputation and of wide experience in their particular fields.

(1) Improving pre-trial procedure, Circuit Court Judge Joseph A. Moynihan of Detroit.

(2) Methods of selection of juries, Common Pleas Judge John P. Dempsey of Cleveland.

(3) Improving trial practice, W. Calvin Chesnut, United States District Judge of Baltimore.

(4) Improving the law of evidence, Dean John H. Wigmore of Chicago.

(5) Simplification of appellate procedure, Professor Edson R. Sunderland of the University of Michigan.

(6) Control of state administrative agencies, Ralph M. Hoyt of Milwaukee.

(7) Improving judicial organization and administration, Judge Edward R. Finch, of the New York Court of Appeals.

The members of the seven committees were very carefully chosen. Judge Parker's aim was to obtain men of broad experience who might bring to the work of their respective committees a wide variety of points of view. In addition, he has, on recommendation of the State Delegates, appointed seven advisory and consulting committees representing each state. A list of the members of these committees appears on pp. 78-82 of this issue. There are doubtless many committees in the state and local bar associations dealing with similar topics, and at Judge Parker's request I am communicating with the presidents of these bar associations requesting them to take the necessary steps to bring their organizations into cooperation with the general program of the Section of Judicial Administration.

I have never attended a meeting of judges and lawyers that held as much promise as the gathering of these committee chairmen in New York at Judge Parker's request. Judge Augustus N. Hand of New York and Judge Ernest A. Inglis of Connecticut, of the Council of the Section of Judicial Administration, Kenneth Dayton of New York and Will Shafroth, representing the American Judicature Society, were also present. Every man recognized the difficulties inherent in the situation, as well as the necessity of overcoming them. The entire day was devoted to a very definite discussion of ways and means and a specific schedule was agreed upon for the work of each committee.

With any other group of men I, too, might be somewhat dubious as to whether or not the aims of these committees could be realized. The profession as a whole has been singularly indifferent to the great problems of judicial administration and procedural reform. While we borrow freely from each other in all branches of the substantive law, in matters of procedure we have been strangely insular. It is by no means unusual to find adjoining states, each with some good points of practice in this field of which the other seems to be as totally oblivious as though they were thousands of miles apart. Such a strange phenomenon could not exist in the realm of business. Competition would quickly eliminate such absurdities, and it is the competition which the courts are coming to face that gives us hope that the present conditions may be overcome.

The admonitions of our leaders in this field have been fruitless. "If one were asked in what respect we had fallen furthest short of ideal conditions in our government," said Chief Justice Taft, "I think we would be justified in answering, in spite of the glaring defects of our system of municipal government, that it is our failure to secure expedition and thoroughness in the enforcement of public and private rights in our courts." To be sure, we have made some progress since 1906, when Dean Pound's address at St. Paul on "The Causes of Popular Dissatisfaction With the Administration of Justice"—an address as true today as when it was uttered thirty-one years ago—met with violent protest from the elder statesmen, who answered Dean

Pound's calm analysis with the assertion that our method of procedure was "the most refined and scientific system ever devised by the wit of man" and accused him of attempting to "destroy that which the wisdom of the centuries had built up." It was not until the members of the American Bar Association journeyed to England in 1924 and witnessed the British courts in action that it became safe for anyone to speak to an audience of American lawyers about the good qualities of the English system of judicial administration. Incidentally, few of us realize how much we owe to Chief Justice Taft for his part in bringing about the visit of American lawyers to the Inns of Court. While it became quite safe to speak of the English system and even to compare it with our own, it must be confessed that we still have been very slow to avail ourselves of our experiences abroad.

Although it must be obvious to everyone that it is the defects of the law on the procedural and administrative side that subject the law—and lawyers too—to such bitter criticism by laymen, it is easy to understand why our present deficiencies have so long continued. Lord Mansfield, as the Chief Justice of England, could reform the antiquated procedure of the law courts of his day. If he were living today and held any judicial position in America, he would find his efforts quite unavailing. If he had to run for election periodically, he might doubt the expediency of making widespread changes which might irritate other people in influential positions. If he were a Chief Justice in one of our jurisdictions, he would not be trying cases at *nisi prius* and he might be unfamiliar with conditions in the trial courts. At any rate, in most of our states he would have no administrative jurisdiction over the judges of other courts, and often very little over his own court. Manifestly, the judges alone cannot change our system. No one who looks back over a century of legislative tinkering with matters of practice would venture to suggest committing the matter to our law makers. The public therefore expects the bar, as an organized profession, to tackle the problem and to solve it. If we do not, one of two things must inevitably happen: Either the laymen will do the job, as they did in England, so admirably described by Professor Sunderland in his "Hundred Years' War for Legal Reform in England," or the work of the courts will gradually be taken over by administrative tribunals, notwithstanding the obvious dangers and defects in their system of procedure.

This competition of the administrative tribunals must be faced. Professor Robson, in his work on "Justice and Administrative Law," has admirably summarized the advantages, as well as the disadvantages, of administrative adjudication. The advantages, he says, are:

> "the cheapness and speed with which they usually work; technical knowledge and experience which they make available for the discharge of judicial functions in special fields; the assistance which they lend to the efficient conduct of public administration and the ability they possess to lay down new standards and to promote a policy of social improvement."

and the disadvantages are:

> "the lack of publicity which attends the work of most tribunals, the air of mystery and secrecy in which their deliberations are shrouded, the failure in most cases to give reasons for the decisions, or to publish reports of decided cases; and the poor quality and insufficient amount of the evidence on which decisions are often based."

There is scarcely any respect in which our traditional courts, if properly organized and properly manned by judges and lawyers, could not meet point by point the advantages claimed for administrative tribunals. Clearly, it is the immediate task of the bar to see to it that this is done, and it is the high purpose of these committees of the Section of Judicial Administration to point the way to the accomplishment of this task.

Here, it seems to me, the committees must pursue the same process which the American Bar Association has followed with considerable success with respect to legal education, admission to the bar and professional ethics. The committees must promulgate standards; then it will be the duty of the state bar associations, with the aid of the local bar associations, to see that these standards are carried into effect. Most well-informed judges and lawyers could collate the experience of various jurisdictions in the procedural field and they would be very likely to reach the same conclusions as to what steps should be taken to effect improvements. The difficulty is that the matter has not been any one person's or one group's business. If improvements do not come within a reasonable time, it may even be necessary to grade the different states, as the Section of Legal Education has graded the law schools, to bring home to those concerned a realization of the actualities of the situation.

The program of the Section is being brought on at a very opportune time, when the proposed Federal Court rules are about to be lodged with the Congress. These rules seem destined to have a profound effect upon the practice of the several states. The Attorney General and the Judiciary Committees of the Congress are giving consideration to measures designed to improve the efficiency of the Federal District Courts and Circuit Courts of Appeal. In all likelihood, many suggestions worthy of consideration by the state courts will be forthcoming. As our Committee on the Supreme Court proposal said in commenting on the defense of free courts as a duty and high privilege of the organized bar: "Constant efforts to improve and speed up the administration of justice will constitute an effective part of that defense." The judges and lawyers of many of our state courts will be driven to attend to these problems if their courts are to stand comparison successfully with the work of the Federal tribunals.

In all of this work we need to keep constantly in mind that the courts exist not for the benefit of either judges or lawyers, but for the sake of citizens who are obliged to litigate their interests. A litigant has certain fundamental rights, which have been defined as (1) a prompt and efficient trial of his case; (2) at reasonable cost; (3) represented by competent attorneys; (4) before impartial, experienced and competent judges; (5) with the privilege of a review of the trial court's determination by an appellate tribunal composed of similar judges who will render a final decision within three to four months after the appeal is initiated. If every court in every state recognized these rights of litigants in daily practice, much of the criticism now directed at the courts, the lawyers and the law would cease and the increasing competition of administrative tribunals would be minimized. Indeed, many of the beneficial aspects of judicial administration would be carried over into administrative adjudication. Both judges and lawyers would be free to concentrate their attention on the problems of the substantive law, which

(*Continued on page 78*)

DECLARATORY RULINGS

A Long Stride Forward in Solving Some of the Growing Problems of Administration Will Be Made if We Can Find Dependable Methods of Advising People What Their Rights and Liabilities Are When They Need to Know Them—Steps of Legal Division of Treasury Department to Develop Such a Method—Plan for "Declaratory Rulings"—Has Received Tentative Approval of Sub-Committee of Congress, etc.*

By Herman Oliphant
General Counsel of Treasury Department

PROBABLY the most important problems confronting our Government today are those generated by the industrialization of the country, which has been proceeding at an accelerated pace since the middle of the last century. The resulting complexity of our present economy is in sharp contrast with the simplicity of that described by Jefferson when he said, "We are a rural farming people. We have little business and few manufacturers among us, and I pray God it will be a long time before we have much of either." And the simplicity of the business life of that time was reflected in simplicity of government.

Frost's life of Andrew Jackson, written within two years of his death, vividly portrays what the Federal Government was like when Jackson was President. This old book's discussion of his messages to Congress and of congressional action on his recommendations presents a striking picture of simplicity. For example, when he told Congress of the final payment about to be made which would wipe out the entire national debt, he said, with evident pride, that there would be about $440,000 left in the Treasury.

Our early Federal Government in the sum of its actual operation comprised little more than the Congress to enact laws and the Courts to interpret them. The Executive Branch of the Government was comparatively small and the extent of its intervention in the life of the nation was relatively slight. Contrasting that condition with the state of the Federal Government today, the outstanding difference is not so much the expansion of the field of Federal legislation or the enlargement of the jurisdiction of the Federal Courts, as it is the enormous development of the Executive Branch of the Government.

This three-fold enlargement of the sphere of Federal rule has come about for reasons as substantial as the altered circumstances of our common life itself. These reasons have been stated so often that they are trite; and, while all thoughtful men would avoid any unnecessary extension of Federal functions, anyone who still hopes for a return of the former simplicity of Federal Government is wholly out of touch with contemporary realities in the fields of modern communication, commerce, finance and industry.

Reverting to the stupendous growth of the Executive Branch of the Federal Government, it now touches and affects the intricate complexity of modern life at so many points and in such a multitude of ways that one of the major problems of our time is the improvement of our administrative processes and techniques. This is not to be attempted by a spurious simplification. The complexity of our problems precludes simple answers. It is to be done by developing and employing not only better personnel but new and improved administrative methods and procedures. In the matter of administration, we still follow old forms for the most part. In few fields of human endeavor has there been less inventive thinking. New ways and a will to try them are needed for, if Federal administration is not markedly improved, it will become a serious retarding factor in the life of the nation and important parts of it may well collapse of their own weight.

Watching the operation of the administrative end of the Government during the War and again since March 1933, has suggested to me numerous points at which improvements in Federal administration might be made, but there is one basic aspect of this many-sided problem to which I should like to direct attention at this time. This is the problem of letting the citizen know what government, in its many present phases, expects of him at the time when he needs to know in order to go about his business with reasonable assurance.

Early in my work on problems of administration in the Treasury, a man presented this problem to me: He had in mind the purchase of a large building in the financial district in New York. The feasibility of the transaction depended on what one item of the tax liability of each of the parties to this proposed deal would be. That liability depended, in turn, on how certain future events might turn out, and it was not feasible to provide for these contingencies in the contract. Though the making of this sale depended on fixing this liability, I had to say to this man that the Government could not then determine what his liability would be. Relying on what advice he could get, he would have to go ahead and make the deal. Not until the whole transaction was closed and the tax had accrued, could the question of tax liability be determined under our present system of tax administration by the Bureau of Internal Revenue, the Board of Tax Appeals and the Courts. If he did not want to take the risk, there was nothing for him to do but forego the deal. He said he could not take that risk. The deal fell through.

For further example, other men have sought to learn the tax status of proposed corporate reorganiza-

*Address delivered before the Hamilton Street Club, Baltimore, January 6, 1938. It will be observed that this discussion is limited to a general statement. The needed qualifications are therefore omitted as well as other collateral and antecedent material usual in footnotes.

tions necessitated by the widespread difficulties created by the depression. They had to be told that, under our method of administration—the only one possible under existing legislation—they would have to go it blind or forego their undertakings. Frequently, this meant that the reorganizations failed. Thus businesses were destroyed. Unemployment and the other consequences of liquidation resulted.

In numerous instances, the Department has tried to mitigate such hardships by making rulings though indicating their lack of finality; but consider a case where the Commissioner of Internal Revenue thus tried to be helpful in one of these situations, and note the consequences.

At the request of an agent, acting on behalf of Henry Ford in the purchase of the minority interest in the Ford Motor Company, including that of the late Senator Couzens, and after an extensive investigation, the Commissioner of Internal Revenue ruled that the Bureau was "disposed to regard $9,489.34 as a fair market value of the stock as of March 1, 1913, and one which should be used in computing any profit made on the sale." The deal was closed on that basis, and the taxpayer made his income tax return in conformity with that pronouncement. Later, the taxpayer was assessed on the basis, not of $9,489.34, but of $3,547.84 per share, and the Board of Tax Appeals held that the earlier finding of the Commissioner was not binding upon his successor in office, nor upon it. It reexamined this whole question of value and fixed $10,000 per share as the proper valuation.

Back of the government's present disability and disinclination earlier to commit and bind itself in such cases lies, of course, the inconvenient fact that the taxpayer also would not be bound. Other considerations not material for present purposes are parts of the policy of the rule here operative. But under this rule and policy in tax administration, and what is said here applies to much of the balance of Federal administration, the taxpayer is confronted with a two-fold difficulty. He cannot have determined and thus ascertain, in advance of the time when he must act, what his legal rights and liabilities consequent upon such action will be; and, when they are finally determined, the law is applied retroactively, and retroactively not only as to him, but as to all others similarly situated. If Federal administration is not to become unconscionably burdensome on the life and business of the country, we must, in view of its present and growing magnitude, find ways to administer Federal law otherwise than in the retroactive fashion so often involved in the present process.

It is easy to take for granted the practical difficulties caused by present law and administrative procedure thereunder. Their very age tends to make them seem normal and natural and a necessary part of the state of things. These difficulties are lost in the obscurity of the familiar. But how surprising and harmful the operation of present procedure often is becomes clear when we consider what life outside the field of law would be like if it were as uncertain as government frequently leaves many of the affairs of those who must act but cannot find out what the legal consequences of their action will be.

Thus suppose a young man broached marriage to a young woman in this fashion, "Buy your trousseau, send out the invitations, arrange for the honeymoon, meet me at the altar, and I will tell you then whether I will marry you." This sounds bizarre, but tax liability in critical cases of provisions made for dependents cannot be determined until long after they have been set up.

Try to imagine the officials at a football game announcing at the close of the game that the winner would not be named until after they had investigated what had happened during the game and had debated and fixed certain rules applicable to the game. This sounds grotesque, but more serious commitments, than those made by football crowds, often have to be made by citizens before the legal consequence of those commitments can be determined.

A partial, but only a partial, solution of this difficulty is to be found in our legislation providing for declaratory judgments. Such judgments cannot be obtained in the great mass of cases where people have not yet acted and need to have their rights and liabilities fixed and known before they act. It is true that, if a contract has been made, if a deed has been executed or a status, such as marriage or divorce, is present, the declaratory judgment can be used in many situations to define rights incident to such an existing arrangement or status; but a declaratory judgment would ordinarily afford no help to a man who wants to embark upon a business undertaking and needs to know his rights and liabilities before he dare do so. That field is not covered, and a long stride forward in solving some of the growing problems of administration will be made if we can find dependable methods of advising people what their rights and liabilities are at the time they need to know.

The problem of finding and developing such a method was put before the Legal Division of the Treasury some two years ago as a general chore for all to work on as the press of immediate tasks permitted. Later, the collective thinking on the problem was cast into an integrated statement and outside suggestions and criticisms were sought. Numerous revisions followed. This work has now culminated in what seems to be a feasible device, which, for want of a better name, has been called "Declaratory Administrative Ruling" or "Declaratory Ruling." Recently, the plan of this new device received the tentative approval of a subcommittee of Congress. If approved by Congress, the purpose is to begin in a small way and try it out in the administration of our tax laws. If it works well there, it would seem to be applicable to numerous and large areas of governmental administration.

Perhaps the plan can best be presented in terms of a typical case in which this device could be used. John Smith owns valuable mining property which he desires to sell. The important factor in the transaction is the value which will be fixed on this property for tax purposes. Before he makes the sale, John Smith needs to know definitely what value the Commissioner of Internal Revenue will place upon this property. It is to be borne in mind that, if today he asked the Commissioner for a ruling on this question prior to the sale, the Commissioner would not ordinarily make it. Moreover, even if the Commissioner fixed the value, the taxpayer could not be certain that, after he had completed the sale in reliance upon such a ruling, the Commissioner or his successor would abide by it in later determining his tax liability in the due course of tax administration.

Briefly, the proposal is this: The taxpayer would file with the Commissioner an application for a Declaratory Ruling. In this application, he would describe in detail the proposed transaction. The Commissioner

would examine the application to determine whether it merited consideration. If he found that it did, he would ascertain whether enough information to enable him to reach an intelligent conclusion had been provided. If not, he could either request more information from the taxpayer or make any other investigation that he deemed necessary to the same extent that investigations of closed cases coming before him are now made. The taxpayer would have an opportunity to appear in person and present any additional information or considerations that he thought relevant. The Commissioner would then issue a Declaratory Ruling in which, in the example supposed, he would fix the value of the property or make such other ruling as was requested or was appropriate in the case before him. He could make the effectiveness of the ruling depend upon compliance either by the taxpayer or by other persons with certain terms and conditions such as the consummation of the contemplated sale within a definite period of time.

The taxpayer, having received the Declaratory Ruling, might decide it was inadvisable to complete his transaction. If so, the Declaratory Ruling would not become effective. If the taxpayer decided to proceed with the sale and pay a tax upon the value fixed in the Declaratory Ruling, the transaction would be ended. If, however, the taxpayer did not believe that the Commissioner's determination of the value was the correct determination, he could not appeal from the Commissioner's ruling (the Commissioner is given an absolute discretion with regard to his ruling), but he could proceed to complete the sale and test out his tax liability before the Board of Tax Appeals or in the Courts as he may do today. In that event, the Commissioner would not be bound by the Declaratory Ruling since the taxpayer himself had chosen not to be bound by it, and the matter would be litigated in the Courts as if no Declaratory Ruling had been issued.

However, if the taxpayer acquiesced in the ruling and completed the transaction in accordance with the terms of the Declaratory Ruling, neither the Commissioner who issued it nor any later Commissioner could alter or repudiate it. The Commissioner, however, would be free to make a different ruling with regard to transactions not expressly included in the ruling and persons not parties to it.

After the sale had been consummated, the taxpayer, if he desired, might request the Commissioner to issue a certificate of compliance stating that the taxpayer had complied with the terms and conditions set forth in the Declaratory Ruling. The issuance of this certificate would make his proper compliance with the conditions of the ruling a matter of record.

The Declaratory Ruling should be useful in almost all kinds of tax cases, but it should be especially helpful in disposing of those tax questions which sometime affect in the same way tens of thousands of taxpayers similarly situated. Thus provision has been made to determine in what year particular securities became worthless and thereby to settle at one time their tax status for all the hosts who may hold them.

Another example of an administrative mechanism calculated to advise people in advance concerning their liabilities, so that they can act in reliance upon such determination, is a provision to be found in an amendment to the Securities Act. Indeed, the Declaratory Ruling may well be viewed as a further and longer step in a development of administrative law of which this amendment is a part.

There was much complaint in 1934 that underwriters, distributors and others interested could not go forward with capital issues because of the uncertainty as to their liabilities under various provisions of the Securities Act as originally enacted. It seemed that this problem was not to be solved by merely enacting a multitude of amendments further particularizing the various provisions of the Securities Act. What seemed to be required to remove much of the uncertainty was an administrative mechanism that would be prospective in operation. This suggestion was embodied in Section 209(b) of the Securities Exchange Act of 1934, which reads as follows:

"No provision of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule or regulation of the Commission, notwithstanding that such rule or regulation may, after such act or omission, be amended or rescinded or be determined by judicial or other authority to be invalid for any reason."

This provision, it will be noted, makes no attempt to impose liabilities upon a citizen. It merely protects him from actual or possible liabilities to which he might otherwise be exposed. The Declaratory Ruling, however, serves a dual function: it frees the citizen from liabilities and at the same time imposes liabilities upon him, thus more fully defining his legal relations. The needs served by this amendment to the Securities Act, the limitation on its operation just mentioned, its constitutional basis and some scattered embryonic forms of this general development in Federal legislation, are set forth in an excellent article by Walter Wheeler Cook of Northwestern University in the January 1935 issue of the American Bar Association Journal.

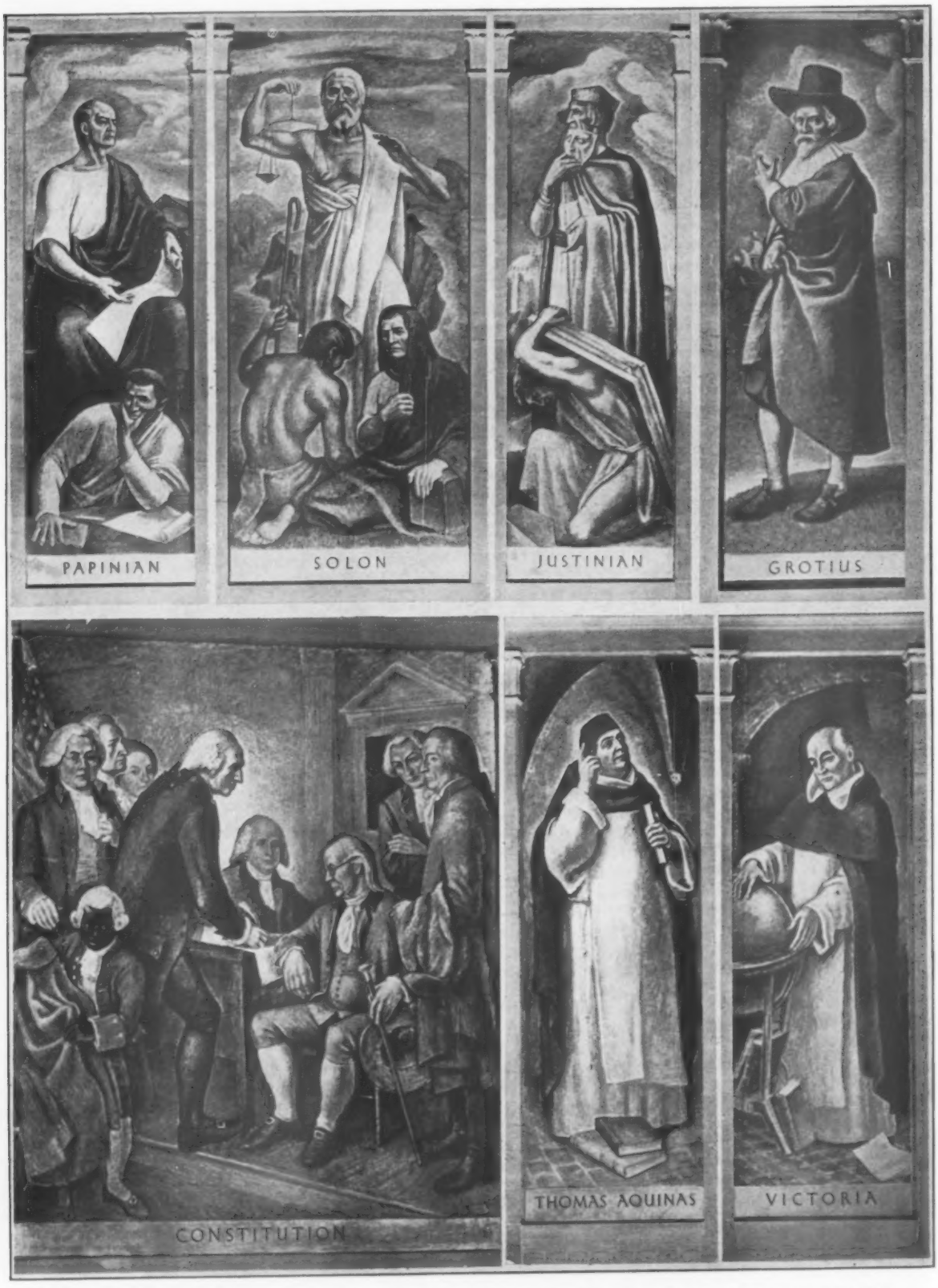
One of these earlier forms of a similar device is to be found tucked away in Section 1108(b) of the Revenue Act of 1926, which provides as follows as to an excise tax:

"No tax shall be levied, assessed, or collected under the provisions of Title VI of this Act on any article sold or leased by the manufacturer, producer, or importer, if at the time of the sale or lease there was an existing ruling, regulation, or Treasury decision holding that the sale or lease of such article was not taxable, and the manufacturer, producer, or importer parted with possession or ownership of such article, relying upon the ruling, regulation, or Treasury decision."

Both the device embodied in the amendment to the Securities Act and the similar but broader one here described as a Declaratory Ruling should have, in addition to the virtue of being prospective in operation, the advantage of giving administrative officers using them the greater freedom needed to clarify legislation by the process of administrative definition and application.

Correction

In printing the list of the members of the Council of the Section on Insurance Law in our December, 1937, issue, the name of Dr. Charles W. Tooke was inadvertently omitted.



SOME MORE MURALS IN THE DEPARTMENT OF JUSTICE BUILDING

LEGAL INSTITUTES AND COURSES FOR THE PRACTICING LAWYERS

Following Approval by Association at Kansas City of a Program for Advanced Legal Education, Council of Section of Legal Education Is Working Out Details of a Series of Institutes and Courses on a National Scale—At Meeting in Chicago on December 29 It Decided to Give First Attention to Organization of Additional Legal Institutes—Current Local Activities in This Direction.

By Will Shafroth

Adviser of Section of Legal Education and Admissions to the Bar

LAWYERS want an opportunity to renew their study of important fields of the law and to be brought up to date on current developments as they bear on their everyday practice. If proof of this is needed, it is to be found in the increasing popularity of legal institutes,—the name which has been given to that form of lectures for the bar which have flourished in Ohio in the past few years, dealing with certain phases of the law and given by recognized authorities,—and in the spread of courses for practicing lawyers under the auspices of individuals, schools and alumni associations.

With the recommendation by the American Bar Association at Kansas City of a program of advanced legal education, the Council of the Legal Education Section is occupied at the present time in working out the details of a series of institutes and courses on a national scale which will enable the practicing lawyer to slake his evident thirst for knowledge. At a meeting of the Council held in Chicago on December 29, it was decided to give first attention to the organization of additional legal institutes, a half dozen of which have been either held this year or planned for the near future.

The Section of Legal Education believes that the success of these institutes as organized in the past has brought this idea beyond the experimental stage. There is a definite demand by the bar for work of this kind and the American Bar Association, as part of its program of service to the practicing lawyer, has formally resolved to do everything possible to stimulate this type of activity on the part of the local bar associations. The subject has already been taken up with a number of the larger associations. Suggestions as to speakers, subjects and organization of institutes have been prepared by a special committee of the Council. A small leaflet is available for distribution on request which sets out some of this information and gives the procedure followed at institutes which have been held in the past.

A short account of current activity will serve to illustrate present tendencies. During this bar year, the Cleveland and Cincinnati Bar Associations have continued with their regular institute programs as in former years, while Indianapolis has inaugurated an institute for the first time, and Detroit, Toledo and Youngstown have decided on subjects, speakers and dates for early in 1938.

In general, it may be said that the turn-out for these institutes has considerably exceeded the attendance at regular bar association meetings despite the admission charge which has been made to finance them. The further fact that the institutes have been a success from a financial standpoint is also important in considering the question of whether the bar wants this type of advanced legal education. From these results it seems to be no exaggeration to say that the bar is eager for an opportunity to renew its contacts with legal education.

The Cincinnati institute on November 17, 18 and 19 was the first to be held since last spring. The speaker was Professor W. Barton Leach of the Harvard Law School, reporter for the Restatement of the Law of Future Interests. Professor Leach's subject was "The Drafting of Wills and Trusts: The Use of Powers of Appointment and the Avoidance of the Rule Against Perpetuities." About two weeks before the opening lecture a printed outline with citation of cases and statutes was sent out to members of the Cincinnati Bar Association. The institute committee, of which Dean Merton L. Ferson of the University of Cincinnati Law School was the chairman, functioned efficiently and members of the ticket selling committee personally visited every lawyer in the large office buildings. Tickets were sold at $2 for the series for practicing lawyers and $1 for single admissions and for student series tickets. The lectures were held from 4:30 to 6:00 P.M. on Wednesday, Thursday and Friday afternoons. The average attendance was around 300. Following the opening lecture an informal "dutch treat" dinner was held in the Netherland Plaza Hotel, where Professor Leach spoke very briefly and members of the committees responsible for the success of the affair were introduced. It was generally agreed that the lectures had been unusually worth while and Mr. Leach's ability was demonstrated by the fact that the attendance on the second day was substantially larger than on the first.

The Cleveland institute was held about a month later. The speaker was Professor Edward Merrick Dodd, Jr., of the Harvard Law School, who lectured on "The Growth of the Corporate Structure

in the United States." These lectures were also held on Wednesday, Thursday and Friday from 4:15 to 6:00 P.M. with a fifteen-minute intermission at five o'clock. Course tickets, as at Cincinnati, were sold for $2, but a rate of $1 was given to lawyers who had practiced less than three years. After treating the historical development of business corporations and business corporation law, Professor Dodd turned to no par stock and surplus available for dividends under modern statutes. He then discussed the Securities Act and the commission which administers it, stockholders' rights, the protection of bondholders and the trust indenture, and, finally, corporate reorganizations. Professor Dodd expressed his purpose as being "to follow an historical introduction with a rather broad survey of recent trends in corporation law, particularly those which concern the relations between the management and the investor. The effect of trying to cover so much ground will necessarily be," he stated, "that I will not be able to go very deeply into anything, but the titles for the lectures which your committee selected indicate a desire for a rather broad survey." A printed outline of the lectures was circulated in advance and a well-organized canvass of practicing lawyers resulted in a sale of 417 tickets. Mr. Delo E. Mook was chairman of the institute committee. The lectures were taken down by a reporter and will be printed and sent to members who bought tickets. Cleveland lawyers who attended reported that this institute was a decided success.

In Indianapolis, where the legal institute was a new venture, Professor Austin W. Scott of the Harvard Law School was the speaker and received a great deal of commendation for the manner in which he discussed "The Law of Trusts." The lectures were held on Wednesday, Thursday and Friday afternoons, December 15, 16 and 17, for two hours each day. Tickets were sold for $2 for the series and $1 to law students. In addition to the large attendance by the bar, which averaged about 200, over fifty students from the Indiana Law School were present, and the lectures were so well received that there is little doubt that this will be a permanent part of the program of the Indianapolis Bar Association. The chairman of the committee was Mr. George E. Palmer of Indianapolis.

The Detroit legal institutes this year will again be under the auspices of the junior bar. The speaker will be Professor Thomas Reed Powell of the Harvard Law School, and his subject will relate to aspects of constitutional law which have a particular application to current developments. The sessions will be held Thursday afternoon, February 3, at 4:30 and at 7:30 P.M., and Friday afternoon at 4:30, followed by a dinner Friday evening. The chairman of the institute is Mr. Ruben M. Waterman.

The speaker at the Toledo institute, to be held on March 5 and 6, 1938, will be Dean Herbert F. Goodrich of the University of Pennsylvania Law School, whose subject will be "Conflicts of Law." He will lecture on Friday afternoon from 4 to 6, on Saturday morning from 10 to 12, and on Saturday afternoon from 2 to 4. There will be a "dutch treat" dinner in honor of the speaker on Friday evening. The Toledo institutes were begun in 1934.

The Mahoning County Bar Association of Youngstown, Ohio, has recently announced the inauguration of a law institute in Youngstown which is scheduled for January 14 and 15. The speakers will include Dean Roscoe Pound on the subject of Equity, Professor Warren A. Seavey on the subject of Torts, and Professor Austin W. Scott on Trusts. The lectures will be held Friday morning, Friday afternoon and Saturday morning.

A little farther in the future is the series of lectures to be given under the joint auspices of the Seattle Bar Association and the University of Washington Law School next summer by Professor Thomas Reed Powell, who will be a member of the summer faculty of the University of Washington Law School. He will present three or four lectures to the members of the Seattle Bar Association on a subject in the constitutional law field which will be similar in nature to those he gives at Detroit.

The Seligson courses for practicing lawyers, which have been successfully carried on for five years in New York City, are being continued and the Association of the Bar is studying the organization of a non-profit institution to take over this work and carry it on for the benefit of the lawyers of New York. These courses, orginated by Harold P. Seligson, are definitely designed primarily for younger members of the bar, but there are also courses for the older practitioner and many of them have been among the students at the school. The Seligson courses have been largely the inspiration for the course inaugurated last year by the Stanford Law Society which consisted of some fifteen lectures dealing principally with procedural subjects. Announcement has recently been made of a second series, to be held early in 1938. "The record enrollment in our first series," Secretary Winston C. Black stated recently, "thoroughly indicated the need for a group of law lectures by distinguished members of the bench and bar." The Seligson course also seems to be responsible in some degree for a course organized in Toledo by Dean Charles Racine of the University of Toledo Law School, and in Philadelphia by the Law Alumni of Temple University under the chairmanship of Judge Charles Klein. Word comes from New Orleans of a number of lectures on taxation, to be given before the practicing bar under the auspices of the Tulane Law School, and again this year courses for practitioners are being given in Chicago and in Washington.

The present plans of the Legal Education Council are to foster both the legal institutes and the program of lectures for practicing lawyers. Members of the Council committee on this subject are: W. E. Stanley of Wichita, Kansas, chairman; Sylvester C. Smith, Jr., of Phillipsburg, New Jersey, Philip J. Wickser of Buffalo, New York, Charles A. Beardsley of Oakland, California, who will be charged with the organization and development of the institutes and courses, and Dean Albert J. Harno of the University of Illinois Law School who will suggest personnel and subject matter for programs on advanced legal education.

SON REACHES VALLEY OF DECISION: TO STUDY OR NOT TO STUDY LAW?

As Graduation Point at College Arrives and the Question of Choice of a Profession Presents Itself, a Lawyer Father Ventures Some Observations Designed to Assist His Son in Making Right Decision—The Desirability of Studying Law—Law as a Vocation—How May One Determine Whether or not He Possesses the Necessary Aptitude?—Certain Suggestive Conclusions.

November 20, 1937.

Mr. William Preston,
Leverett House,
Harvard College,
Cambridge, Massachusetts.

Dear Son:

I shall again pontificate. I am, however, nearing the end. There will be but few more to read—assuming that you do read them.

I shall this time discuss two related but distinct subjects: (1) The Desirability of Studying Law, and (2) Law as a Vocation.

The Desirability of Studying Law

In my judgment there are many considerations which might impel one to study law without convincing one that he should adopt it as a vocation.

Some of these I shall attempt to indicate briefly.

I know of no finer mental training or discipline. The law requires close application, develops the power of analysis and the ability to reason. A real lawyer must have not only information as to the law, but the ability to analyze a situation and to reason to a correct conclusion. After all, these are qualities which make for success in any vocation in which the work is that of the head and not of the hands.

Again, I know of no better training for the duties of citizenship than the study of law. Indeed government consists—in time of peace—in the making, interpretation and administration of laws. Sir Arthur Quiller Couch once wrote that every educated man should at least have the consciousness that Greek and Latin once existed. So I think that every citizen should at least have some consciousness of the origin and development of law. This is especially true in the United States. In most countries the development of government powers has been evolutionary or revolutionary—frequently a combination of both.

In this country this is true only to a limited extent. The basis of the power of the national government has been and is a written constitution—written by lawyers. While revolution—the war between the states and resulting amendments—and evolution—a changing point of view on the part of the people and more lately of the courts—have played their parts, the ultimate results have been embodied in decisions of and expressed in opinions by the Supreme Court. The same thing is largely true of the state governments.

In my opinion only one trained in the law can properly appraise this problem.

No doubt there are certain handicaps which are inherent in the lawyer's point of view—the defects of its qualities. Woodrow Wilson—whose memory I revere—once said that it took twenty years for him to rid himself of the lawyer's habit of mind. I think he meant by this that lawyers are inclined to look upon the constitution as a "lawyers' document"—to use President Roosevelt's phrase—to consider its denotations rather than its connotations, to overemphasize its words and minimize the results of revolution and evolution.

I agree that something may be said for this view. I insist, however, that, to understand our system of government—based as it is upon a written document—one must know its background, its interpretation by the Supreme Court and something of the laws made in pursuance thereof. With this knowledge one may make an intelligent choice of the road one will take. Without it, one is leaping in the dark.

Again, modern business is regulated and hedged about by so many laws that almost every executive must be a lawyer or have a lawyer always at his elbow to recognize the problems that confront him. Our maligners might put it, "squat like a toad, close at the ear of Eve."

What I have said indicates—or, at least, so I hope—that every citizen will find a training in the law helpful both in his vocation and in his avocations. It does not mean, however, that every one should study law.

The difficulty is the time element—assuming that the financial situation is not to be considered.

If you study law you will be almost twenty-five years old when you will be graduated. That is more than one-third of your life expectancy. If you then decide upon being trained for another vocation that will probably mean three years more in some university or technical school, and a start on your own at twenty-eight, or thereabout—a fairly late age for a beginning.

My thought is that, when you are graduated, if you have any decided opinion as to what vocation you would like to be trained for you should immediately continue your education along that line. If you have no decided opinion it might be well to begin the study of law. It would give you an opportunity to determine whether you would like to pursue it as a vocation and would fit you for the duties of citizenship and the responsibilities of business.

My advice, therefore, is that, if when you are graduated in June you are undecided what vocational training you would prefer and what vocation you should choose, you apply for admission to the Law School, and if in September you are still undecided you enter it

and there remain, or at least until you come to some definite decision.

THE LAW AS A VOCATION

The best discussion of law as a vocation that I know of is "The Young Man and the Law" by Simeon E. Baldwin. You probably remember that I handed you this and suggested that you read it. I do not know whether you did. If you have not read it I think that, by all means, you should do it before you make your decision as to a vocation.

Judge Baldwin was a great intellectual force. He was largely responsible for the organization of the American Bar Association, and sometime its president. He was chief justice of Connecticut. From that place he was retired, as required by the Connecticut constitution, because of age. After that he was elected Democratic governor of the state, and served two terms.

At the Yale Law School I had Railroad Law and Constitutional Law under him.

He had an encyclopedic mind and a reading knowledge of several languages—ancient and modern. He seemed to have read everything worth while and to have retained an accurate recollection of all that he had read. I believe that he was one of the wisest as well as one of the most learned men it has ever been my good fortune to know. He wrote many books—among them one on "Railroad Law," and another on "The American Judiciary." In addition to all this he was a highly successful lawyer who received large financial rewards for his professional work.

I mention these things to point out the value of his book as an aid in deciding whether to choose the law as a vocation.

What I shall hereinafter say, however, will reflect my own opinions and not be a paraphrase of Judge Baldwin's ideas. I have not even opened his book for more years than I like to remember.

As is necessarily true of all vocations, there are both advantages and disadvantages in the law as a life work. I shall mention first some of the former and then some of the latter, without any attempt to be exhaustive.

Perhaps the most attractive feature of the law is the fact that it is a highly intellectual pursuit. Many businesses and some professions exercise other talents. The law, however, demands intense mental application and close reasoning. While some think that its long practice tends to narrow the outlook, it can not be doubted that, within its sphere, it develops as does no other vocation the reasoning power. Moreover, success is advanced by the ability to write—letters, opinions, contracts and briefs. I have always thought that the thing that most lawyers lack is the ability to phrase their thoughts in inartificial, clear, lean and supple English.

Another phase of the law, which has always interested me, is the variety of the problems presented. It is rare that any two are exactly alike. This, of course, is more true when one's practice is more or less general.

As I look back over the last few months I recall that among the questions I have had to consider are: the conduct of an institution for dipsomaniacs, the liability of a doctor to his patient, the method of conducting railroads, the constitutionality of the government's public utility program, public utility rates, construction of wills, the liability of a lumber company to its employees, rules of the road, the relationship between a host driver and his guest in an automobile, the living conditions of working men, and many others.

Many of these things necessitated, not only an investigation of the law, but an acquisition of facts not only of the particular transaction, but of the business under examination. These investigations require the highest type of intellectual acumen.

Some one has said that this necessity for acquiring factual knowledge is one of the disadvantages of the law. The thought is that a lawyer is burdened with acquiring a detailed, accurate knowledge of many facts in which he is not interested, which he would like to forget when the necessity of knowing them has passed.

I am not persuaded that this is entirely true. When the information relates to the conduct of some occupation or business its acquirement is broadening and is likely to become useful. Even when it relates only to some ephemeral happening I do not believe that the time and intellectual effort are wasted.

A lawyer must go to the sources, sift the true from the false, analyze the facts and arrive at a conclusion. Such mental discipline can not fail to be helpful in any vocation or avocation. Indeed, I have often thought that the best mental training one can have is occasionally to read a book on a subject in which one has absolutely no interest—and to read it understandingly and analytically.

When one is well trained and reasonably capable the law furnishes a satisfactory income—certainly places one in higher income brackets than a mere salaried position where one has not unusual executive ability, family influence or capital. The old saying holds, "lawyers live well and die poor."

Certainly there is no social handicap in the practice of the law. Moreover its practice—even more so than its study—furnishes an advantageous point of departure for business or public service should one later be attracted to these fields.

A pleasant feature of the law is its good fellowship and intelligent companionship. I know of no profession that is more tolerant. One of the best proofs of which I know of Shakespeare's almost omniscience is what he says of lawyers:

"And do as adversaries do in law—
Strive mightily, but eat and drink as friends."
(The Taming of the Shrew, Act I, S. 2.)

If you live in a non-metropolitan city you will find that the nearest approach to intellectual companionship will be among the lawyers.

This is not only true locally. I have derived great pleasure and tremendous intellectual stimulus from my contacts made through the American Bar Association. In this way I have formed lasting friendships with some of the ablest, most attractive and most intellectual lawyers and men in the country. It has given me a broader national outlook socially and professionally than I could possibly have acquired any other way.

So much for the advantages. Now for the disadvantages.

I feel that this phase of the law will not especially concern you, as I believe you are not particularly interested in amassing money. This letter, however, would not be complete did I not point out that the law is not a favorable field for the acquiring of a fortune or even early retirement. There have, of course, been lawyers who have acquired fortunes. Sterling did, and endowed the Sterling Memorial Library

at Yale. He did that, however, not in his practice, but because of his association with Morgan. Cook, the author of "Cook on Corporations" did, and left $15,000,000 to the University of Michigan Law School, but he did so because of his association with Mackay of telegraph and cable fame. Again I repeat most are able to live well, but compelled to die poor.

Again on the intellectual side all is not all beer and skittles. One is often forced to study subjects entirely uninteresting and sometimes distasteful. As I have said, this is excellent mental discipline, but sometimes Spartan. Frequently it is Pegasus at the plow. It may be that this is measurably true in all vocations.

Again the competition is extraordinarily severe. I haven't checked the figures, but I think I am safe in saying that there are more lawyers per capita of population in the United States than in any country in the world. Moreover, this competition is absolutely out in the open. Some one said that the doctor buries his mistakes. This certainly is not true of the lawyer. If you are a trial lawyer the jury will know it, the judge will know it, your client will know it. All will spread the news. To a lesser extent the same is true of office work. Sooner or later your mistakes will find you out. A hundred peering eyes are focused upon everything a lawyer does. There is very little luck about a lawyer's success. Luck may give him the opportunity, but ability determines the result.

I think that one of the most tragic things—vocationally—that can happen to a young man is to begin and especially to linger in the practice of the law, and then realize that he has no aptitude for it. If this be true, however, the sooner it is realized the better, for the earlier the change the better the chance in the new vocation.

The profession is overcrowded, as practically all are. There are so many with aptitude that one without it is practically helpless.

How shall one determine whether one has the necessary aptitude? That is a difficult question. It is a matter of instinct as much as a matter of judgment.

First, I think that one's imagination must be stirred by the lives of great lawyers and one be inspired to emulate their examples. That alone, however, is not enough. That means the love of the rewards that come to a lawyer. It does not necessarily indicate the ability to achieve them. General Grant was a great soldier. He was near the nadir as a speaker. Yet his great ambition was to be an orator.

The first essential, I should say, is an analytical mind—the ability to take a set of facts or legal questions and concisely analyze them. Any one can go to the key numbered digests and find out what the courts have said on certain subjects. Few men can, on their own initiative, analyze either facts or law.

The next desideratum I should say is thoroughness—the ability to go to the bottom of an uninteresting or even disagreeable subject. Without these two qualities—the power of analysis and the gift of thoroughness—success is unattainable in the law.

To be an outstanding success a lawyer should have something of what in the medical profession is called the "bedside manner"—the ability to "sell" himself to the person or persons with whom he is talking. This means patience, poise, force and the ability to phrase ones thoughts in clear and cogent language. The same rules apply whether one is talking to a client, a witness, a board of directors, a judge or a jury.

Of course, with judge or jury this quality is essential. The old conception of a lawyer was the picture of a man who tried cases in the court room. This is still true in towns and smaller cities. Without this ability—the ability to think quickly, to express oneself readily, to mobilize all of one's resources, on the instant, one can not hope to be successful as a trial lawyer.

In towns and the smaller cities the profession is not sufficiently subdivided to permit of success for one who can not succeed in court. Even in a city the size of Metropolis I should not advise one without trial ability to practice law unless he can become associated with a firm large enough to subdivide its practice. Even then his position is precarious. Advancement may be slow. There may not be any opportunity in any other large firm. Private practice will be difficult because of lack of trial ability.

In the largest cities, like New York, Chicago, Boston, and Philadelphia, the situation is different. Many large firms who have exceedingly lucrative practices do little trial work. Often they have no trial lawyer in their organization and "farm out" their trial work. They confine themselves to the drawing and foreclosure of mortgages, corporate organizations and reorganizations, receiverships, the drawing and construction of contracts and wills, business advice, estates, opinions on title and similar subjects.

My advice would be that no one without reasonable trial ability should practice law except in a community where the various fields are sufficiently specialized to permit competition among large firms for men who confine their activities to office work.

Another phase of the practice of the law that is distasteful to some types of mind and abhorrent to others is the fact that a lawyer (to use the English expression) is "on the rack," as is a cab, for hire to all who apply.

As I understand the current conception of legal ethics a lawyer is not at liberty to counsel in advance wrong doing or to agree to defend one who is about to do a wrong or commit a crime. But, once the wrong has been done or the crime committed, he may defend the putative wrong doer or the alleged criminal. In so doing he should not judge in advance his client's guilt or innocence. That is the function of the judge and jury. His duty is to present all rules of law, all facts and all extenuating circumstances that may tend to help his client. He should not even express his personal opinion on the merits of the case. Boswell quotes a most interesting conversation with Dr. Johnson on this feature of a lawyer's duty.

To some minds this savors of intellectual prostitution. I think it depends upon whether one has the attitude of an advocate. Your mother says in my view no client has ever done wrong. Obviously she thinks I have the attitude of an advocate. You may not have. Think it over.

Of course, the considerations mentioned generally in my previous letter on choosing a vocation apply with equal force to the law. Take for instance residence. If you want to practice patent law or international law you could not expect to exist in Metropolis. Of course, the general practice is everywhere in varying degrees. But if you should specialize, as in admiralty law, residence in a port—New York, Boston, New Orleans, San Francisco—is necessary. It is unnecessary to amplify.

No doubt those who have suggested or assumed that you would practice law have had in mind the

fact that the law is my vocation. That is a consideration not to be ignored. It is the easy way. It should mean—if you display moderate aptitude and develop reasonable capacity—a fair competency. Your grandfather who has more common sense than any one I know and who is entirely realistic, seems to feel that for you not to take advantage of what he calls this opportunity would be foolish.

In Great Britain or Europe—in the case of an only son—the choice would be almost inevitable. There careers are built like coral islands. I am not sure that this is or should be the American way. Here, more often I think, sons have lifted themselves above the status of their fathers—usually by undertaking an entirely different vocation.

The course that should be pursued, it seems to me, depends entirely upon the ability, initiative, aptitude and tastes of the son. If these things strongly incline the son to his father's vocation, he will have in beginning a certain advantage—the benefit of a generous handicap, as in golf, provided, of course, his father has been reasonably successful.

When these factors do not directly incline the son to his father's vocation, the problem is more difficult. If he has decided aptitude and inclination for some other vocation, that should be the vocation chosen.

It is when there is no marked leaning either toward the father's vocation, or any other, that the choice becomes difficult. An uncompromising utilitarian would unhesitatingly say that in this event the son should adopt the father's vocation and take advantage of such an association. There is much to this argument, but it is not necessarily conclusive.

After all, such an association merely assures an opportunity. It does not guarantee success. I remember one instance when it worked perfectly. General Luke E. Wright was a distinguished lawyer,—sometime District Attorney General of the county, Governor General of the Philippines and Secretary of War. He gave a place in his office to, and quickly made a partner of, his son, Major Eldridge Wright. The Major had a wonderful opportunity, for the firm represented the most prominent and best paying clients in the city. He took full advantage of it and was, unquestionably, during his day, the leading lawyer in his section. I have always thought that his success was attributable to two things—an unexcelled opportunity, and noteworthy ability.

There are other instances of the same thing—Charles Evans Hughes, Jr., Elihu Root, Jr., Judge Thomas D. Thatcher, and others.

I could mention an equal, and, I think, a greater number of instances where "Life with Father" has been unsuccessful and sometimes tragic. When aptitude and ability are not present, the father becomes impatient. Even when they are present there is likely to be a clash of wills which does not make for happiness.

There are one or two other things I might mention in this connection—disjecta membra. The position of the lawyer has shifted much in the last few decades—particularly in the last lustrum. Formerly he was the guide, philosopher and friend of his community. Today, at least in the larger cities, his is a mere technical vocation, like engineering.

I have discussed this change in my address as President of the State Bar Association entitled "The Future of the Lawyer." I shall send you a copy, with the suggestion that you read it.

Furthermore, his income is less proportionately than formerly. I should say that in cities of the size of Metropolis, the average incomes of lawyers under thirty-five and, indeed, of all lawyers outside of those connected with the few large firms, is not over twenty-five hundred dollars a year.

CONCLUSION

My conclusions—suggestive and by no means definitive—are:

If, when you are graduated, you have not decided upon any other vocational training, you should enter law school with the idea that the training will be beneficial and will enable you better to decide whether you shall adopt the law as a vocation.

I should not advise you to choose the law as a permanent vocation unless you find that you have a reasonable aptitude for it and that it is congenial.

Whether these things are true you can learn in law school. The best test is whether you are able to make the law review in a first class law school. If you do, you will be assured of a place in a large office in a metropolitan city. If not, you will have to join the ranks of the average.

In no event should you choose the law as a vocation unless you feel that you can achieve reasonable success without any aid from me.

This, of course, does not mean that I shall not always be eager to help. But, after all, you must stand on your own feet.

With love,

DAD.

Arrangements for Annual Meeting, Cleveland, Ohio

July 25-29, 1938

HEADQUARTERS—HOTEL CLEVELAND

Hotel accommodations, all with bath, are available as follows:

	Single for 1 person	Double (dbl. bed) for 2 persons	Twin beds for 2 persons	Parlor Suites
CLEVELAND	$2.75 to $4.50	$4.50 to $6.50	$6 to $10	$12 & up
ALLERTON	2.25 to 3.50	3.75 to 5.00	4.50 to 6.00	10
CARTER	3.00 to 5.00	5.00 to 7.00	7 to 10	12 & up
HOLLENDEN	3.50 to 7.00	5.00 to 7.50	6 to 12	12 & up
STATLER	3.00 to 6.00	4.50 to 8.00	5 to 8	10 & up

Explanation of Type of Rooms

A single room contains either a single or double bed to be occupied by *one person*. A double room contains a double bed to be occupied by *two persons*.

A twin-bed room contains two beds to be occupied by two persons. A twin-bed room will not be assigned for occupancy by one person.

A parlor suite consists of parlor and communicating bedroom containing double or twin beds. Additional bedrooms may be had in connection with the parlor.

To avoid unnecessary correspondence, members are requested to be specific in making requests for reservations, stating hotel desired, number of rooms required and rate therefor, names of persons who will occupy the same, and arrival date, including definite information as to whether such arrival will be in the morning or evening.

Requests for reservations should be addressed to the Executive Secretary, 1140 N. Dearborn St., Chicago, Illinois.

LEGAL RIGHTS FOR NEWS

Review of Cases in Which the Question Has Arisen—Recent Decision of United States Supreme Court in Case Involving Appropriation of News from Newspaper by Radio Station for Broadcasting Purposes—This Is a New Problem Some Possibilities of Which Have not Been Exhausted by the Decision—Question of Appropriation of News by One Press Association from Another Settled in the International News Service vs. Associated Press Case—On This Authority It Is Probable That Appropriation of News by One Newspaper from Another Would Be Similarly Enjoined—Difficulties Involved in Copyrighting Newspaper Story, etc.

By Frank Thayer

Associate Professor of Journalism and Lecturer on Law of the Press, University of Wisconsin; Member of Illinois Bar

RADIO barks at journalism; the legal repercussions of this conflict affect both instrumentalities of publicity. Within the last two decades radio, a new industry, has stepped onto the journalistic horizon, finding a permanent place for itself and performing some functions formerly thought belonging largely if not exclusively to the newspaper as an institution.

While the radio has taken the edge off the newspaper's function of giving so-called spot news, it does have definite limitations. Radio has a definite time dimension; it has little reference or record value to the listener. The newspaper can give news more completely; so far as pictures, cartoons and certain types of entertainment features are concerned the newspaper may be regarded as superior to the radio.

The commercial development of radio has taken over some of the functions of the newspaper in that the radio station or chain sells advertising time and broadcasts spot news, human interest news features, and entertainment. The radio is thus brought into competition with the newspaper.

Journalism as expressed by the newspaper finds radio a healthy competitor which the newspapers recognize; however, the newspaper publishers believe that in some phases of news distribution, radio helps the newspaper. It is at least true that with the great commercial development of radio in the last ten years, metropolitan newspaper circulation volume, in general, has been sustained.

Radio has not been equipped to gather news, as have the newspapers, with their correlated press associations, such as the Associated Press, the United Press, and the International News Service. This difficulty is being remedied, however, although it is not within the province of this study to discuss that phase of the radio question.

Legally, the competition between broadcasting of news and the publishing of printed news in the newspaper has arisen in the case of the *Associated Press v. KVOS, Inc.*[1]; this case was originally decided for the radio station, but in the Circuit Court of Appeals for the Ninth Circuit, the district court decision was reversed.

The basis of the Circuit Court of Appeals decision was largely *International News Service v. Associated Press*[2] decided in 1918, and *Herbert v. Shanley Co.*[3], both of which cases dealt with the rights as to intellectual products, the former as to rights in news stories and the latter as to rights in musical productions.

The United States Supreme Court, in a decision handed down Dec. 14, 1936, reversed the decision of the Circuit Court of Appeals for the Ninth Circuit. The basis for this reversal was that inasmuch as the Associated Press is a corporation not for profit it is not legally capable of sustaining damages and so could have no standing in the federal district court. The bill for injunction against news pirating was therefore dismissed inasmuch as the damages were not proved to exceed the jurisdictional sum of $3000, exclusive of costs and interest.

Mr. Justice Roberts stated in his decision:

"The only attempt to meet that burden (of proof of damage) is a reply affidavit filed on behalf of respondent wherein it is deposed 'that the payments made by newspapers for said news sold to them by complainant in the territory served by said radio stations is upwards of $8000 per month, which is being imperiled and jeopardized by the acts of defendant . . . by its unlawful and wrongful appropriation of complainant's news.' This deposition must be read in connection with the statement in the bill that the respondent (AP) makes no profit from furnishing news to its members but equitably divides the expense amongst them. The association cannot therefore lose the $8000 in question. If the three newspapers[4] in the affected territory cease to pay the sum, they will save it, not lose it, and as to any other damage they may suffer from the petitioner's competition, the affiant is silent."[5]

A radio station's appropriation of news reports after publication in a newspaper is the vital problem

1. Associated Press v. KVOS, Inc., 80 Federal Reporter, 2nd Series, 575 (1935).

2. International News Service v. Associated Press, 39 Supreme Court Reporter 68; 248 U. S. 215; (1918) 63 L. ed. 211, 2 A. L. R. 293.

3. Herbert v. Shanley Co., 242 U. S. 591; (1917) 61 L. ed. 511, 37 Supreme Court Reporter 232.

4. The Bellingham Herald, the Seattle Post-Intelligencer, and the Seattle Daily Times.

5. KVOS, Inc., v. Associated Press, 57 Supreme Court Reporter 197, at 201 (1936).

There would seem to be every reason to question the conclusion of Mr. Justice Butler, when he states that if the news-

in the *A. P. v. KVOS* case. So far as appropriation of news stories by one press association from another press association, the question was settled in the *International News Service v. Associated Press* case.

It is of at least persuasive authority, on the basis of this case, that appropriation of news by one newspaper from another would be similarly enjoined. Appropriation of news by a radio station from a newspaper or press association is a new problem, some possibilities of which have not been concluded in the *A. P. vs. KVOS* case.

First, it must be determined just what *news* is. One definition is that "News is anything timely that interests a number of persons, and the best news is that which has the greatest interest for the greatest number."[6]

Another definition is: "News is a timely record of action or opinion."[7]

Quoting from the opinion of Mr. Justice Pitney:

"No doubt news articles often possess a literary quality, and are the subject of literary property at the common law; nor do we question that such an article, as a literary production, is the subject of copyright by the terms of the act as it now stands. In an early case at the circuit Mr. Justice Thompson held in effect that a newspaper was not within the protection of the copyright acts of 1790 (1 Stat. 124) and 1802 (2 Stat. 171). Clayton v. Stone, 2 Paine 382, Fed. Cas. No. 2,872. But the present act is broader; it provides that the works for which copyright may be secured shall include "all the writings of an author," and specifically mentions "periodicals, including newspapers." Act of March 4, 1909, c. 320, §§ 4 and 5, 35 Stat. 1075, 1076 (Comp. St. 1916, §§ 9520, 9521). Evidently this admits to copyright a contribution to a newspaper, notwithstanding it also may convey news; and such is the practice of the copyright office, as the newspapers of the day bear witness. See Copyright Office Bulletin, No. 15 (1917) pp. 7, 14, 16, 17.

"But the news element—the information respecting current events contained in the literary production—is not the creation of the writer, but is a report of matters that ordinarily are *publici juris;* it is the history of the day."[8]

News stories as such then have an intrinsic quality, different from purely literary composition. News is fleeting; it is of value for the moment, then as out of date as last year's calendar or classical literature, so far as value to the journalistic profession may be concerned. It is this intrinsic element that the newspapers wish to protect, not necessarily the literary style in which the particular story may be expressed. True, enough, the literary style of some special dispatch by a noted war correspondent or political observer the newspaper may wish to protect; it may of course do so under the Copyright Act. The problem however is not with the special story by an outstanding writer, but rather with the mine-run type of news that day to day becomes the essence of the newspaper's value to the reader.

Some newspapermen have claimed that news is property; there is no sound legal basis for such an opinion. Mr. Justice Pitney did say in his opinion "between them [meaning the press associations] it [news] must be regarded as quasi-property, irrespective of the rights of either as against the public."[9]

This part of the opinion is the legal basis for the belief that news is quasi-property, that it possesses some of the elements of property, but not all. If Sir William Blackstone may be cited, property is the sole and despotic dominion which one man claims and exercises over external things of the world in total exclusion of the right of any other individual in the universe. The right of property is the right to own, use, and dispose of a thing tangible or intangible. In a strict legal sense, property may be regarded as an aggregate of rights, guaranteed by the government; in the ordinary sense, property signifies the thing itself rather than the rights attached thereto.[10]

It is the intangible element, intrinsic in news stories, that presents the problem. If, as Mr. Justice Pitney has stated, the right to report an event might be regarded as *publici juris,* wherein does the protection lie for the newspaper's efforts in ascertaining the *news element,* or the intangible quality that makes news of value?

It should be noted that a distinction exists between the news element of a newspaper story and a so-called news tip.

"We are inclined to think a distinction may be drawn between the utilization of tips and the bodily appropriation of news matter, either in its original form or after rewriting and without independent investigation and verification . . . both parties avowedly recognize the practice of taking tips, and neither party alleges it to be unlawful or to amount to unfair competition in business."[11]

The essence of the distinction may perhaps better be shown by illustration. If there is used by one press association a story about an unusual murder in Davenport, Iowa, and a rival press association learns about the story directly or indirectly through the first press association it is the practice to use the first press association story as a tip; the second press association on the basis of this tip would communicate with its correspondent at Davenport to investigate, verify and file a story on the aforesaid murder; such a transaction might not encompass more than a fraction of an hour. Such a practice would be regarded as entirely fair; on the contrary, it would be regarded as unfair for one press association to write or rewrite a story on the basis of the other press association's story without independent investigation.

To appreciate properly and understandingly the problem involved in the protection of news stories, it

papers affected did not spend the sum of $8000 per month they would save that amount of money. Reasoning on this basis, we might say that if a newspaper discharged its reporters, canceled its contracts for feature services, and dropped memberships in press associations, it could save a major part of its expenses of operation; if such savings were effected, the newspapers would fail to be newspapers in the true sense of the word; their very reason for existence would be abandoned. It would seem, further, that if the newspapers so gave up payments for reporting and news services that the very essence of the business would be destroyed; it would be tantamount to going out of business. It is indeed strange that to avoid news pirating by another, the newspapers would have to give up their reason for existence, either as a capitalistic enterprise or as a quasi public organization serving a public necessity in a democracy, so that damage could be shown. Unquestionably, there exists here a flagrant violation of fair competition; a business is threatened and if the damage is continued there would seem to be no full, complete and adequate remedy at law. It would seem as already established in the International News Service v. Associated Press case that rights of a pecuniary nature are being threatened and that the only protection lies in equity. F. T.

6. Bleyer, W. G., Newspaper Writing and Editing (revised and enlarged edition). Boston. 1932. p. 30.

7. Thayer, Frank, Newspaper Management. New York. 1926. p. 415.

8. International News Service v. Associated Press, 39 Supreme Court Reporter 68, at 70, 71.

9. Ibid at 71.

10. Fulton Light, Heat & Power Co. v. State, 65 Misc. Rep. 263, 121 N. Y. Supp. 536; affirmed 138 App. Div. 931.

11. 39 Supreme Court Reporter 68, at 74.

is helpful to disintegrate a news story into its elements. It is said that a scientist remarked one time that he could understand nothing unless it were expressed in the terms of a formula. The news story may be so expressed, as follows:

The news story is equivalent to X (an event) plus Y (the acquisition of facts pertinent to the event) plus Z (the rhetorical expression of the facts, that is, literary expression).

The event itself is ordinarily *publici juris*, or may be made so upon discovery. The event once disclosed therefore may be regarded as common property unless the facts concerning it are protected as herein later explained. If the facts of an event are known to but one person, that person has exclusive right to such facts; unless compelled to do so, he need not reveal the facts to anyone in the world; the exception of course is that one person knowing certain facts may be forced to reveal them upon threat of contempt of court; if two persons know certain facts, either may be compelled to reveal them if such facts are pertinent to a trial, unless the information may be legally regarded as a privileged communication.

All events of course are not public. There are secret events as of a secret society pledge, or a secret agreement between individuals. If another discovers such events or agreements, he may so report them independently perhaps at his personal peril, but there is no general law preventing him from so doing.

Take the automobile accident, for example. Any one who sees the event may report the event. If there is a merger of two large banking houses, the outsider who ascertains the facts may report them.

Much of the news that appears in the press is so discovered and reported; the event so reported may be likewise told by others who hear about that event.

The newspaper however has no exclusive right to report public events; this right is clearly protected by the First Amendment to the United States Constitution in declaring the right of freedom of speech and freedom of the press. The situation is that the newspaper while not possessing any better right than any member of the public does nevertheless have better means and opportunity for the reporting the general run of events than does the non-professional writer.

The second term of the equation or the acquisition of facts pertinent to the event involves a system for learning about the existence of facts, the gathering of the facts, and the preparation of the facts for publication. A devastating fire may destroy a small city in Idaho, for example; there is likely a correspondent there who files a report of the facts to a press association; all newspaper clients or members of the association would have the benefit of that particular set of facts expressed in news story form. The member newspaper could use the facts or it could disregard them as unimportant to its particular readers or subscribers.[12]

The newspaper is equipped not only to ascertain facts about events but also to publish them in newsprint and to distribute such printed newsprint or newspapers over a wide area.

12. A newspaper is not a public utility. See Shuck v. Carroll Daily Herald 247 N. W. 813, 215 Iowa 1276, holding that newspapers are not required to print either news or advertising.

The metropolitan newspaper represents a large investment in its physical equipment, its building owned or leased, its telegraph, telephone, cable and wireless systems or affiliations, as well as its contracts with news and feature service agencies. Such a newspaper has a staff of employees which it has trained; it has established news "runs" or "beats" by which it periodically contacts many news sources for possible news.

Its investment in capital goods runs into huge sums; its typesetting, stereotyping and printing machinery; its equipment for mailing and other forms of distribution. This system by which the large newspaper functions is represented in a lesser degree by the non-metropolitan press, practically all the daily newspapers of which group are members or clients of press associations.

In legal concept, the newspaper represents a business, not dissimilar to other types of commercial enterprise; it would seem that such an institution should have equitable protection in the self-same fashion as any other business.

Courts clearly recognize the right to do business and in fact regard this right as one form of intangible property, a right protected by injunction on the basis of unfair competition. The very system or organization through which a business operates may be so protected. In *Meccano v. Wagner*[13], it was held that there was unwarrantable appropriation of the methods and system of the complainant. In that case the court stated:

"Unfair competition exists also in that the complainant has established a business system which is peculiarly its own. This was done at the expense of time, thought, labor, and much money. If it be assumed that this court is in error with respect to the finding of palming off of defendant's goods for the complainant's, establishing thereby unfair competition, yet the defendants use complainant's business and the system it has established. In these it has acquired a property right of which its competitor cannot deprive it by introducing his goods into, and as a part of, the complainant's business and system."

This right to conduct a business is well established in a line of equity cases. It seems that this right is protected when there is pirating of a laundry or milk route by a former employee; these cases indicate that it is not the particular customer that represents a property interest, but rather the names, the contacts, and the system in continuity, representing time, labor, money, and management, for which system protection is afforded.

On the basis of equity's right to grant relief when there is no full, complete and adequate relief at law, protection is given business by injunction, in case of depredations upon business and its system either by a former employee or by a competitor.[14]

In the *International News Service v. Associated Press* case, Mr. Justice Pitney in sustaining the jurisdiction of equity in the controversy stated:

"We need not affirm any general and absolute property in the news as such. The rule that a court of equity concerns itself only in the protection of property rights treats any civil right of a pecuniary nature as a property right and the right to acquire property by honest labor or the conduct of a lawful business is as much entitled to protec-

13. 234 Fed. 912, 920; see also Prest-O-Lite Co. v. Davis, 209 Fed. 917, 921-4.

14. See Walsh, W. F., on Equity, Section 44, pp. 221-223; ibid, Section 47, pp. 234-237; Truax v. Raich, 239 U. S. 33, 37, 38; Brennon v. United Hatters, 73 N. J. L. 729, 742; and Barr v. Essex Traders Council, 53 N. J. Eq. 101.

tion as the right to guard property already acquired. It is this right that furnishes the basis of the jurisdiction in the ordinary case of unfair competition.[15]

"But in a court of equity, where the question is one of unfair competition, if that which complainant has acquired fairly at substantial profit, a competitor who is misappropriating it for the purpose of disposing of it to his own profit and to the disadvantage of complainant cannot be heard to say that it is too fugitive or evanescent to be regarded as property. It has all the attributes of property necessary for determining that a misappropriation of it by a competitor is unfair competition because contrary to good conscience."[16]

It seems clear and well established, therefore, that news gathering and distribution by an organization systematically organized for that purpose may be protected against unfair competition, provided the evidence of violation of the right to conduct a business is sufficient and there are no procedural errors.

It seems clear also that news is quasi property, or such property that possesses attributes in the nature of a civil right sufficiently pecuniary in character to give equity jurisdiction in the case of unfair competition.

The third part of the equation given for explanatory purposes concerns the literary style, order of statement, and expression in which the news story is written. At common law, any literary work, if unpublished, remains the property of the writer. So soon as publication is made, common law copyright is lost, and the particular literary expression becomes public property.

Statutory copyright, founded upon the United State Constitution, Article 1, Section 8, makes up for the deficiency of the common law. The general provisions of the Copyright Act are sufficiently clear; what may be copyrighted may be easily ascertained in so far as such publication is standard literary material. For the purposes of this study, the question arises as to how far the Copyright Act aids the newspaper.

As has already been noted in the quotation from Mr. Justice Pitney's opinion in the *International News Service v. Associated Press* case, a newspaper may be copyrighted; that is, the entire newspaper.

The registration of a copyright for a newspaper must follow the usual requirements for copyright, the application, the paying of the required fee, the giving of notice, and the filing of two complete copies of the newspaper. If substantial changes are made in the editions, even though these editions bear the same date line, a separate copyright should be sought for the substantially changed edition. Provision for copyrighting the entire newspaper is covered in part under Class b of Section 5 of the Copyright Act.

The news element itself is not copyrightable, however, as was pointed out in the *International News Service v. Associated Press* case. It may happen, however, that a news story may be so written that it is a literary production; such a news story may be copyrighted; on this point reference may well be made to *Chicago Record-Herald v. Tribune Association:*

"It is true that news as such is not the subject of copyright, and so far as concerns the copyright law, whereon this action is based, if the Herald publication were only a statement of the news which the copyrighted article disclosed, generally speaking, the action would not lie. But in so far as the Edwards article involves authorship and literary quality and style, apart from the bare recital of the facts or statement of news, it is protected by the copyright law. That the entire copyrighted article involved in its production authorship as generally understood, and manifests literary quality and style in striking degree, is impressively apparent from its perusal."[17]

The same procedure is provided for the copyrighting of a newspaper story as is provided for the copyrighting of an entire newspaper, except that in the case of the copyright for a newspaper story, but one copy of the story need be filed; that is, one complete copy of the newspaper containing the newspaper story sought to be copyrighted must be filed. It is not sufficient to clip the story and send that clipping alone to the Register of Copyright.

Some of the difficulties involved in the copyrighting of a newspaper story may be appreciated in the experience of the New York Times, which endeavored to copyright a story on Capt. R. Amundsen's discovery of the South Pole. A quotation from Richard C. De Wolf, former Register of Copyright, illustrates a practical difficulty:

"A temporary injunction was hastily obtained about midnight of March 8, but the required copies of the newspaper containing the copyrighted story were not mailed until early in the morning of March 9. Although the difference was only one of a few hours, it was held that the action had been brought before it was permissible and the injunction was held void."[18]

The basis for this denial was that a suit for infringement of copyright cannot be instituted unless and until the required copies are deposited and the claim for copyright registered; this stipulation is included in Sec. 12, Copyright Act of March 4, 1909, as follows:

"No action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this Act with respect to the deposit of copies and the registration of such work shall have been complied with."

It is plain that the copyright law is not adequate to protect the news element of the newspaper story. If the particular story is re-written in another newspaper office, the literary style of the original story may be entirely changed so that even an action for infringement of copyright would not be likely to be successful. Real protection must come through the injunction against unfair competition.

Closely related to copyright protection is the possibility of trade mark utilization. Federal statute makes provision for the registration of a series of literary productions; however, the trade mark must be arbitrary rather than the name of one of the series.[19] The series of writings of a columnist appearing under a standard set headline may be trade marked; it would not be possible, however, to trade mark one day's column; it is necessary that the series be continued over a period of time and that it have the same identification or title indicating the work of a particular author. It would

15. International News Service v. Associated Press—39 Supreme Court Reporter 68, at 71.

16. Ibid. at 73.

17. Chicago Record-Herald v. Tribune Association, 275 Federal 797 ff; see also Amdur, Leon H. Copyright Law and Practice. New York. 1936. pp. 116-7.

18. De Wolf, Richard C. An Outline of Copyright Law. Boston. 1925. pp. 49-50; see New York Times Co. v. Star Co., 195 Federal Reporter 110; New York Times Co. v. Sun Printing and Publishing Association, 204 Federal Reporter 586. A question might be raised why Mr. De Wolf mentions that "copies" were not deposited; the present law is that for the copyright of a newspaper story, but one copy of the complete newspaper containing the story for which copyright protection is sought need be filed.

19. See U. S. Code Annotated-Title 15, Section 85, Note 24.

seem, therefore, that a humorous column or a column of political observations from Washington, if appearing under a title that would stand for each appearance of the column, could be trade marked. The column title or headline would be regarded as the identification of the author or originator, the same as a certain mark would indicate the physical product of a craftsman. The copy of such a column for a particular day, if regarded as a literary product, could be copyrighted as well; the copyright would protect the immediate, particular column; the trade mark would protect the title or headline identifying the entire series. It should be noted that although copyright is obtained through the Library of Congress, trade mark registration for such a series of literary material is through the United States patent office.

In the KVOS case there was admitted the appropriation of news, its broadcasting of the same, and its destructive effect on the press, when the station moved to dismiss the action; its excuse was that its taking and circulation by means of ether waves was wholly eleemosynary. The Circuit Court of Appeals on its ruling on the substantive side of the case held however that this contention was not valid.

"Common sense compels us to agree with the complainant that the purloining of complainant's fresh news and its circulation in KVOS' 'Newspaper of the Air' are both elements of a business of publication for profit. This profit is to be gained through widening its circulation at the expense of the circulation of the Associated newspapers. Complainant's news is not only made stale to those of their readers who first have access to the 'Newspaper of the Air,' but also is made free, while still hot, to their readers who pay a usual subscription price for their papers. The obvious tendency of these factors is to cause complainant's papers to lose circulation and with it advertising volume which is based on circulation. We are unable to see any theory under which such a diversion of advertising income from the Associated papers to KVOS with its incidental destruction of subscriber income, can be called anything but 'unfair competition.' "[20]

A similar defense was made on the ground that the acts of the defendant were not for profit. This type of defense was given consideration in the significant case of Herbert v. Shanley Co.[21] In this case the wrong alleged was the infringement of copyright of a musical composition. The facts were that one of Victor Herbert's compositions was played in connection with the serving of meals at a public restaurant. The defense was that there was no charge for the music and so that there was no profit made on the playing of such composition or compositions. The defendant's position was essentially that the music was entirely incidental and that it was given away, without any charge whatsoever to the patrons of the restaurant. This contention, however, was held unsound. The court stated:

"The defendant's performances are not eleemosynary. They are a part of a total for which the public pays, and the fact that the price of the whole is attributed to a particular item which those present are expected to order is not important. It is true that the music is not the sole object, but neither is the food, which probably could be got cheaper elsewhere. The object is a repast in surroundings that to people having limited powers of conversation, or disliking the rival noise, give a luxurious pleasure not to be had from eating a silent meal. If music did not pay, it would be given up. If it pays, it pays out of the public's pocket. Whether it pays or not, the purpose of employing it is profit, and that is enough."[22]

Some criticism of the injunction granted by the District Court in the International News Service v. Associated Press case was made by Mr. Justice Pitney in the Supreme Court decision. The original injunction prevented either the taking or using of the Associated Press news, "either bodily or in substance from bulletins issued by the complainant or any of its members, or from editions of their newspapers *until its commercial value as news to the complainant and all of its members has passed away.*"

The restriction was inferentially too broad, declared the court, but the criticism was perhaps as indefinite as the restriction. It was admitted that the problem presented practical difficulties and so the Supreme Court refused to change the wording of the injunction, referring the difficulty back to the District court where proper application could be made.

In a dissenting opinion Mr. Justice Holmes stated that the only ground for recognizing the complaint, without special legislation, would be the implied misstatement as to the source of the news. He believed that the defendant should be enjoined for an unstated number of hours after publication by the plaintiff unless due credit should be given to the originating source, or in this case, the Associated Press.

One versed in practical newspapering should recognize that even Mr. Justice Holmes' suggestion would not be a practical solution of the difficulty.

In the dissenting opinion of Mr. Justice Brandeis, in the International News Service v. Associated Press, it is pointed out the use made of the news taken from the Associated Press was not legally objectionable from the standpoint of the purpose for which such appropriation of news was made. While this conclusion may have merit, there should be analysis of the problem of the newspaper business which has as much right to protection from unfair competition as any other legitimate enterprise.

"Their purpose was not even to divert its trade, or to put it at a disadvantage by lessening defendant's necessary expenses. The purpose was merely to supply subscribers of the International News Service promptly with all the available news. . . . It thus appears that the protection given by the injunction is not actually to the business of the complainant news agency; for this agency does not sell news nor seek profits, but is a mere instrumentality by which 800 or more newspapers collect and distribute news. It is these newspapers severally which are protected; and the protection afforded is not from competition of the defendant, but from the possible competition of one or more of the 400 other papers which receive the defendant's service."[23]

It is admitted that the case is complicated in nature, but despite the fact that the Associated Press is merely an instrumentality, damage is possible to the member papers when pirated news is taken from another press association for the benefit of client papers. It should be noted also that there is considerable rivalry between the press associations, both as to the furnishing of service to newspapers and as to manner and style of such service. Taking of news in a wholesale manner from another association would tend to lower the value of any exclusive manner of handling

(*Continued on page* 64)

20. Associated Press v. KVOS, Inc. 80 Federal Reporter, 2nd series, 575, at 582.
21. Herbert v. Shanley Co., 242 U. S. 591.
22. Ibid.
23. International News Service v. Associated Press. 39 Supreme Court Reporter 68, at 80.

SECTION CHAIRMEN HOLD MEETING AND DISCUSS PROBLEMS OF INTERNAL COORDINATION

An Innovation Which Amply Justified Itself and Is Certain to Be Followed as a Part of the Operating Machinery of the Association in Future—Section Reports in House of Delegates and How They Should Be Dealt with—Two Schools of Thought Contrasted—"Daily Newspaper" at Annual Meeting Considered—Solution of Membership Problem: "Jones Asks Smith"—Long Distance Planning and Other Matters Discussed

AN innovation which amply justified itself, in the opinion of those participating, was the meeting of Chairmen of Sections of the Association, held in Chicago on December 10 and 11. President Vanderbilt presided and the following were present, representing the various sections:

Carl V. Essery, Chairman of Section of Bar Organization Activities; Rollin M. Perkins, Chairman of Section of Criminal Law; Howard D. Brown, Chairman of Section of Insurance Law; John P. Bullington, Chairman of Section of International and Comparative Law; last retiring Chairman, Joseph D. Stecher, representing Section of Junior Bar Conference; R. G. Storey, Chairman of Section of Legal Education and Admissions to Bar; James L. Shepherd, Jr., Chairman of Section of Mineral Law; Murray Seasongood, Chairman of Section of Municipal Law; Bert M. Kent, Chairman of Section of Patent, Trade-Mark and Copyright Law; Elmer A. Smith, last retiring Chairman, representing Section of Public Utilities; Nathan William MacChesney, Chairman of Section of Real Property. Also present were John H. Voorhees and Frank T. Boesel, representing the Board of Governors, Judge Frank E. Atwood, Chairman of the Committee on Law Lists.

Internal Coordination to the Front

Heretofore the idea of coordination has been applied principally to the larger units represented by the Bar Associations. But with that part of the problem disposed of for the present, the necessity for internal coordination came to the front. In concrete terms, there was need for the coordination of the work of the various Sections, as well as of the different committees. The meeting at Chicago dealt with the problems of the Sections in this regard.

There was plenty to consider. Objectives needed to be defined, possible conflicts due to overlapping activities needed to be adjusted, the relations of the Sections to the general scheme of organization needed to be clarified in some respects, and the part which each could do toward furthering the general aims of the Association, apart from its activities in its special field, needed to be understood and accepted.

In opening the meeting, President Vanderbilt employed the familiar conception of an army to illustrate the unity of aim which vitalizes the diversity of function of these agencies of the Association. "I cannot understand why so many years have gone by without a conference of Section Chairmen," he said. "The Section Chairmen, with the Committee Chairmen, are the ones who do the work. In terms of an army, the Board of Governors are the headquarters staff, the House of Delegates is the Congress supplying the money for the campaign, the Section and Committee Chairmen are the corps commanders in the field, and the State and local Bar Associations represent the constituencies of the House. If we are going to be effective in changing the Association over, in making it an organization which accomplishes things, we must do it through the Section and Committee Chairmen."

Section Reports in House of Delegates

Much of the discussion concerned matters of detail, important in themselves from the standpoint of the smooth functioning of these agencies of Association work, but not of particular interest to the general reader. However, there were certain highlights of the meeting which the members will no doubt find of interest. One of these was a discussion of the relation of the Sections to the House of Delegates. Those who attended the Kansas City meeting will at once recognize this as a repercussion from certain incidents that occurred on that occasion. Certain Section Chairmen felt that, under present arrangements, there was not sufficient time for proper statements and consideration in connection with the presentation of reports to the House of Delegates at the Annual Meeting, and others were inclined to the view that the work and reports of the Sections should be dealt with by the House on a basis different from that of the reports of the Committees of the Association itself.

It was urged in support of this view that while it is entirely proper and necessary that the House of Delegates, as the governing body of the Association, should pass on questions of general Association policy, it was impracticable for it to consider and pass efficiently on the specific technical recommendations presented in such reports. It was recognized of course that the problem presented was highly significant and the discussion took a wide range.

One Chairman expressed the view "that an Association as big as ours, will ultimately have to come to the general plan of the American Medical Association where the House of Delegates will debate a question like Social Medicine, but would not pretend to debate the question of how to perform a Caesarean operation, which comes to them from the College of Surgeons. As to things which are in the technical fields of the Sections, the proper approach is to strengthen the Section procedure so that the House of Delegates has confidence that the Section's opinion represents the best judgment in the American Bar Association. It

THOSE WHO TOOK PART IN RECENT MEETING OF SECTION CHAIRMEN

should not attempt to have the matter reviewed by even so competent a body as the Board of Governors."

Two Schools of Thought Contrasted

President Vanderbilt suggested that there appeared to be two schools of thought: one inclined to the view that the Sections should be more or less autonomous, while the other held their conclusions should be reviewed and dealt with by the House as the final and authoritative body. The Sections, in fact, he said, had been largely autonomous, but under the new form of organization they had to act in closer relationship to the House of Delegates. After some further discussion the problem of action, at least for the present, appeared to resolve itself into the adoption of some method by which the work of the Sections could be presented to the House and there acted on in a more satisfactory manner.

The proposal was finally made, and adopted by a vote of six to three, that the meeting recommend to the House of Delegates the appointment of a committee to confer and cooperate with the Sections. No attempt was made to define the functions of this committee, but the general idea was that it could inform itself fully as to what matters the Sections expected to bring before the House for action and be prepared to assist both the Sections and the House in securing proper consideration. Another proposal, adopted unanimously, declared it to be the "sense of the Section Chairmen that it will further cooperation between the Sections and House of Delegates if the Chairmen are given reasonable time to present reports at the close of the Section meetings."

Public relations of course came up for consideration. The main discussion concerned methods of giving more satisfactory information to newspapers and getting more accurate and useful reports as a result. A chairman inquired if it would not be advisable to publish what might be called a "daily newspaper" at the Annual Meeting—a news report of exactly what took place—which could be distributed immediately. It was stated that the man who runs the publicity for the American Bankers Association said that their meetings were reported by shifts of stenographers and the reports were quickly cut in stencils, without changes, and made available for members of the press. He had added that the knowledge that this process was being followed had a very salutary effect on the speakers; it made them a little more careful about what they said and how they said it. It was urged that the press would by this plan have an accurate report of what had actually happened and should find this information of great assistance.

"Daily Newspaper" at Annual Meeting Considered

The matter was under consideration for quite awhile, and the consensus of opinion was finally summed up in the following resolution, which was unanimously adopted: "Resolved that the Board of Governors investigate the advisability of having the meetings reported in such a manner that the press can be given a complete transcript at the conclusion of each meeting and that the Board of Governors also be requested to examine the advisability of publishing a daily newspaper at the next Annual Meeting, to be delivered each morning, containing all the proceedings at all of the various meetings of the preceding day."

The advisability of indexing the reports of the Sections and their committees was considered. Some of these reports are really significant and there is a constant demand for them. It was the general opinion that a way should be found to make the material available to those interested in special subjects. Various suggestions as to the best way of handling the situation were made, and President Vanderbilt summed up the results of the discussion as follows: "It is the unanimous view of the Chairmen and of the President that they would like to see worth-while papers, after being properly edited, published in a separate bound volume as soon after the Annual Meeting as possible and that they would be willing to contribute, as far as finances will permit." The possibility of preparing indexes for State Bar Association material was brought up, but no decision was reached.

Solution of Membership Problem: Jones Asks Smith

Membership problems, both of the Sections and of the Association, were considered. The importance of the new sustaining membership plan as a means of enabling the Association to provide additional facilities for carrying on its work more effectively was recognized. The best methods of approach in such matters were discussed and, after all was said and done, it was generally agreed that the proposition boiled itself down to the simple formula, "Jones asks Smith." In other words, nothing so effective has been found, or is likely to be found, as a personal request to become a member from a member who knows the prospect.

Another matter discussed was desirable limitations on the terms of office of Section officials. Various Chairmen gave reports as to the situation in their Sections. The discussion developed a preference for a term of two, or certainly not over three years, for the Chairman, the same for the Vice Chairman, a term of four years for the Secretary, and the same term for members of the Council. The promotional method of succession, particularly in the case of the Chairman, was pointed out. This method enables the new Chairman to appoint committees and start work immediately, thus doing away with the lag which frequently results from the change.

Long Distance Planning and Other Matters Discussed

Other matters discussed were long distance planning, in which the Section of Criminal Law seems to have taken the lead by the appointment of a special committee; the types of Section periodical publications and the possibility of the issuance of periodicals by other sections; Section dues and the advisability of permitting a variation in the amount as between the different Sections, which was carried over to the January meeting of the Board of Governors; coordination of the work of the Sections with State Bar Associations, the consensus of opinion being that the Section Chairmen should organize their kind of work in local Associations wherever possible; the cooperative possibilities of the recently organized Section on Bar Organization; and the possibility of establishing a sort of clearing house at headquarters, provided with a library and proper facilities, for information to Bar Associations and others with regard to matters in which they are especially interested.

The meeting adjourned with all those who attended convinced of the practical importance and significance of such gatherings and with the general conviction that similar ones would be held in the future.

ADDRESS AT DEDICATION OF TENNESSEE'S NEW SUPREME COURT BUILDING

Unique Facts in History of Tennessee Courts—The Wautauga Association and Its Court with Legislative and Judicial Functions—The "Cumberland Compact" and the Twelve Notables Who Sat as a Court Under Its Authority—The State of Franklin and Its Turbulent Judicial History—State Constitution of 1796 Made No Provision for Supreme Court—Judiciary Provisions of Same—Supreme Court of Errors and Appeals Established Later — Remarkable Case of a Court That Declared Itself Unconstitutional—Later History*

By Hon. Charles N. Burch
Member of the Bar of Memphis, Tennessee

I AM very happy to be here this morning on this memorable occasion and under the generous appointment of President George H. Armistead, Jr., to represent the Bar Association of Tennessee, though I feel that my abilities are quite inadequate to represent that fine body of men and women who compose the Tennessee bar.

This occasion brings me mingled feelings of pleasure and regret. I am more than pleased that our Supreme Court and our Court of Appeals will be housed in an adequate building with comfortable surroundings, and appointments and the facilities which they have so long deserved. I cannot refrain, however, from expressing a feeling of regret on leaving the old court room in the Capitol. Every stone in that room is saturated with fine memories and traditions. And I am sure that it is a wrench to the feelings of all of us to leave it. But that is what progress means—keeping abreast of the times and living and working under modern conditions.

The Supreme Court of Tennessee has a glorious history and perhaps I cannot do better on this occasion than to bring again to your attention a few historical facts. In doing so, I acknowledge my great indebtedness to Judge Samuel C. Williams, formerly a member of the Supreme Court, and the man who has done more than anyone during our generation in preserving the history of our State and our courts.

About 1770 a few North Carolinians were settled on the banks of the Wautauga River in East Tennessee. They were far removed from the centers of government of Virginia and North Carolina, in fact the mountains were an almost insurmountable barrier. They had brought with them, however, the traditions and standards of their Anglo-Saxon ancestors. They were too far away to get any help from the government of Virginia or the government of North Carolina and hence one of their first steps was to set up an independent government of their own, wherein the supremacy of the law would be maintained and no man would be a law unto himself. They formed the Wautauga Association and provided for the creation of a court of five members.

John Carter was the presiding judge or chairman of this Wautauga Association court. It was a court which exercised both judicial and legislative functions, —in fact, governed and regulated the activities of society in accordance with the standards and traditions which they had brought with them. It is a striking illustration of the love of the Anglo-Saxon for law and order with, at the same time, the greatest liberty extended to the individual so long as he does not trespass upon the rights of others. This was the first court established in what is now the State of Tennessee. The court adopted the laws of Virginia as their guide, believing that the settlement was in Virginia. Learning, however, at a later time that the settlement was in North Carolina, they addressed a memorial to the legislature of North Carolina—the memorial being prepared by John Sevier, who afterwards became the first governor of Tennessee. In this memorial it was stated that the settlers were on the frontier and far away and were apprehensive that "we might become a shelter for such as endeavored to defraud their creditors."

Thus we see that the first government set up in what is now Tennessee was based upon the inviolability and the faithful performance of contracts. The records of this first court of Tennessee are missing up to 1778, but after that date many interesting records are to be found. Among the entries on the minutes of this court we find the following:

"On motion it did appear that Joshua Williams and a certain James Linsay did feloniously steal a certain bay gelding from Sam'l Sherrill, Sr. Ordered that if the sd Sam'l Sherrill can find any property of the said Joshua Williams or sd Linsay that he take the same into his possession, he first leaving bond and security with the County Clerk pay'd to the court in behalf of said Williams and Linsay for his safe keeping the same until lawfully called for."

While this was a rough and ready method of granting reparation, yet who can say that justice was not done. Another entry reads as follows:

"John Colyer is found guilty of petit larceny and it is ordered that the said John Colyer be taken to the stocks and that he there receive twenty lashes well laid on his bare back. From which judgment James Stewart, Esq., one of the justices dissents and enters his protest that he does not believe it to be law."

Evidently the dissenting justice had heard of cruel and unusual punishment and was of the opinion that the punishment meted to John Colyer was of that character.

Another entry of the court shows the solicitude for an orphan child who was bound to a blacksmith and the blacksmith bound himself "to endeavor to

*Address delivered at dedication of Building at Nashville, Tenn. on Dec. 4, 1937.

learn said boy his art and mystery." Grammarians of the present day, no doubt, would have this entry read "teach said boy his art and mystery" instead of "learn said boy his art and mystery" but refinements of that kind were unnecessary in a primitive country.

Another very interesting entry on the minutes of this court is as follows:

"Joseph Culton came into court and proved by the Oath of Alexander Moffett that he lost part of his left ear in a fight with a certain Charles Young and prays the same to be entered of record."

Now why should Joseph Culton wish a permanent record made of the fact that he lost part of his ear in a fight with Charles Young? An explanation is to be found in a later entry on the minutes of the court, which reads as follows:

"Ordered that Elias Pybourn be confined in the publick Pillory and that his ears be severed from his head; that he receive at the publick whipping post thirty-nine lashes well laid on, and his left cheek branded with the letter H, and his right cheek with the letter T, and that the sheriff of Washington County put this sentence in execution between the hours of Twelve and Two this day."

And so it is that Joseph Culton goes down in history as having lost a part of his left ear, not as a punishment for crime but the loss was a mere casualty at a fair and honest fight.

I mention these proceedings of the first court in Tennessee as indicating the desire of our ancestors to be governed by the law, and as also reflecting the conditions of the times. Happily, we have preserved this desire to be governed by law and, happily, also we have discontinued the cruel and bloody punishment inflicted in those early days.

With this scant reference to the first court of Tennessee, I turn my attention to the first lawyer who practiced law in Tennessee. This gentleman was one Luke Bowyer who had migrated to the Wautauga settlement from Virginia. His advent there was in the memorable year of 1776, and he was later to be one of those who participated in the battle of King's Mountain. He took a prominent part in the affairs of the community, though his legal education was somewhat defective. Indeed, at a later time, when lawyers of education and talent arrived in the State, Bowyer began to lose ground. It is sad to relate that he had some bad habits of dissipation and he did not shów that respect for the judiciary which is meet and proper. At the November term of the county court of Freene County in 1786, we find the following entry:

"Luke Bowyer fined five shillings for insulting the court. Fi. fa. issued for same. Luke Bowyer fined ten pounds for insulting the court and five shillings for profane swearing. Fi. fa. issue for same. Luke Bowyer ordered to be confined in the stocks for one quarter of an hour; ditto one hour."

It would seem from the above that Luke was not particularly concerned about the issue of Fi. fa.'s and it took confinement in the stocks to make him realize that he must respect the court.

Perhaps some explanation for Bowyer's conduct may be found in the fact that in the early frontier settlements, lawyers were not a popular class. They were considered largely as parasites and men who were prone to stir up trouble and Bowyer perhaps felt that in affronting the court he was merely preserving the honor and independence of the profession to which he belonged.

I should have stated that the court of the Wautauga Association was a court not only of first instance but of last resort, and while not composed of men learned in the law, it functioned well to meet the primitive conditions of those early days.

Later the Wautauga settlement petitioned the State of North Carolina to be brought under its jurisdiction and, thereafter, there were appointed a corps of justices of the peace for what was termed the Washington District. There was no appeal from the judgment of these justices when sitting en banc.

The Wautauga court was the first great event in our history. The next event was the formation of the Cumberland Compact by the people of Nashborough (now Nashville) and a few neighborhood settlements in the year 1780. The leading man in the Cumberland settlement was James Robertson, one of the great men of Tennessee. The Cumberland Compact provided for the selection of twelve "notables" and these notables exercised all the functions of government. The notables sat as a court, James Robertson presiding, though he was not a lawyer, and this court of notables administered justice in a manner to meet the needs of the community. It is another illustration of men of our race and breed who intended that the community should be under a government of law and not under a government of men.

The third great event in our history was the formation of the State of Franklin, which existed from 1784 to 1788. It came into existence for the reason that the inhabitants of the northeast portion of our State were unable to get any protection from North Carolina and concluded to set up a government of their own, and the State of Franklin existed as a free and independent state for a period of four years.

Lawyers likewise were not popular in the State of Franklin and there was an attempt to get a provision in the constitution of that State excluding from its Legislature all lawyers, physicians and clergymen. Judge Williams, in his fine treatise entitled "The Lost State of Franklin" has preserved us a record of that State. It had a rather turbulent existence and the court houses of the State of Franklin were raided by the officers of North Carolina and court records removed, and likewise the court houses of North Carolina were raided by officers of the State of Franklin. Finally the State recognized the jurisdiction of North Carolina, and North Carolina justices began to preside in the courts of that part of the State without interruption.

Finally, in 1790, North Carolina ceded for the second time her Tennessee territory to the United States and President Washington appointed three judges for this southwestern territory, David Campbell, John McNairy and Judge Perry. These judges were known as Superior Court judges. But there was no Supreme Court in the sense in which we understand that term today.

The fourth great event in our judicial history was the adoption of the Constitution of 1796, under which Tennessee became a state of the Union. This constitution made no provision for a supreme court. The Constitution of 1796 made the following provision for a judiciary:

"The judicial power of the state shall be vested in such superior and inferior courts of law and equity, as the legislature shall, from time to time, direct and establish."

Acting under this provision of the Constitution, the first legislature of the State established a superior court with original and final jurisdiction, and with ap-

TWO HANDSOME NEW STATE SUPREME COURT BUILDINGS RECENTLY CONSTRUCTED

pellate jurisdiction of cases arising in the Court of Pleas and Quarter Sessions.

When this system went into effect, three judges were provided for and these were: John McNairy, Archibald Roane and William Blount. However, the distances of travel were great and inconveniences and hardships were many and there were frequent resignations. There became a member of this court in 1798 a rawboned youth, who was later to become famous, and who had come into the State of Tennessee from North Carolina riding one race horse and leading another, and with a license to practice law in his pocket. This was Andrew Jackson, who became a superior court judge and served until 1804 when he resigned to give attention to his private matters and military duties. His place on the bench was filled by his friend John Overton and, hence, the first volume of our Tennessee reports, known as 1 Overton, consists of opinions of the superior court judges, which have been preserved to us by the industry and care of Judge Overton.

The need of a supreme court was keenly felt, particularly in view of the fact that important questions were being decided in one way by superior court judges in one part of the State and in another way in another part of the State. The father of our supreme court system was a lawyer of the Franklin bar of less than three years experience—Thomas Hart Benton, writing under the pen name (as was the custom of the time) of Sir John Oldcastle, a series of articles to The Impartial Review of Nashville, advocating a reform in the judicial system of the State. One of the reforms upon which he insisted was for a supreme court with no original jurisdiction but a court of errors and appeals. In order to carry out his plan, Benton was a candidate for the State senate and was elected and in 1809 succeeded in passing the act of November 16th of that year which was entitled "An Act to establish Circuit Courts and a Supreme Court of Errors and Appeals."

The supreme court provided for was to consist of two judges elected by the legislature and provision was made for a circuit judge to sit with these two judges. No provision was made for a chief justiceship. Two eminent lawyers were elected by the Legislature. Hugh Lawson White and George W. Campbell; both were lawyers of outstanding ability and both became national figures. Judge White was twice offered an appointment to the supreme court of the United States but declined. Later he was a candidate for the presidency against Martin Van Buren. Every contemporary record points to his high judicial capacity and fine character. George W. Campbell, the other one of the first two supreme court judges, was likewise a man of great ability. He had served in Congress and in later years became our secretary of the treasury and

our minister to Russia. No two better men could have been found to administer the judicial system of a new state.

Notwithstanding this supreme court was the creature of the Legislature, it did not hesitate to assert its independence in holding an act of the Legislature unconstitutional as impairing the obligation of contracts (Townsend v. Townsend, Peck 1). John Catron was the first chief justice of our Supreme Court (from 1830 to 1836) and, indeed, after that time no one seems to have had the title of chief justice until after the adoption of the Constitution of 1870, though, of course, some one of the judges presided.

In 1831 a very remarkable event took place—something without parallel, I think, in American history, and that is the fact that a court declared itself unconstitutional. Mr. Cecil Sims of the Nashville bar has called to my attention the Appendix of 2 Yerger (10 Tenn.). This Appendix was added by Judge William F. Cooper in his edition of the Tennessee reports. Judge Cooper, it may be said at this point, was probably the most learned lawyer ever developed in our State.

The case is entitled "Special Court at Nashville, Bank of the State v. Charles Cooper and others, January 1831." The report of the case shows that the Legislature, by Chapter 95 of the Acts of 1829, had created a special court consisting of Jacob Peck, one of the judges of the Supreme Court, Nathan Green, one of the Chancellors of the State, and William E. Kennedy, one of the Circuit judges. The jurisdiction of this court was to hear and determine, according to rules of equity practice, claims of the Bank of the State against its officers, depositors and others. The act authorized this court to call defendants before it and examine them on interrogatories. Its decision was final and from it there was no appeal. All three judges wrote opinions and all three agreed that the act creating the court was an unconstitutional act,—among other reasons, that it deprived defendants of the right of trial by jury; that it amounted to the taking of property without due process of law; that the judges had not been elected in accordance with the Constitution, as well as other reasons. I think in the opinion of Judge Green he states in a few words and in the clearest possible manner the duty of a judge when he finds his oath to support the Constitution requires him to do one thing and an act of the Legislature requires him to do another thing. Judge Green said:

"I have the highest respect for the legislature as a co-ordinate department of the government; and whenever they pass an act, the presumption is in favor of the power; nor are we to disregard it upon a mere doubt, nor unless constrained by the high obligations imposed by our oaths to support the constitution. But when we *cannot* endorse the act and *support* the constitution, the act is not law, and imposes no obligation."

In the same case Judge Peck, in rendering his opinion, makes a clear statement of the relation of the departments of government:

"The legislative, the executive and the judicial departments are three lines of equal length, balanced against each other, and the framework, forming an equilateral triangle, becomes stronger the more its parts are pressed. Like the foundation of our religion, the trinity, it is the key on which the whole arch rests. The people have erected it; they have seen its suitability for duration, and compared its proportions with the external view of the pyramid, whose age is untold, and which alone, of all the works of man, has withstood the ravages of time."

There may be other cases of other courts declaring the act creating them unconstitutional but I am unaware of any.

The fifth great event of our judicial history was the Constitution of 1834. That Constitution for the first time made the Supreme Court a court of the constitution and not merely one to be created by the act of the Legislature. The Constitution of 1834 provided:

"The judicial power of the state shall be vested in one Supreme Court; in such inferior courts as the legislature shall, from time to time, ordain and establish, and the judges thereof; and in justices of the peace. The legislature may also vest such jurisdiction as may be deemed necessary in corporation courts."

For the first time in the history of the State the Supreme Court became a department of government which could not be abolished by the Legislature. Under the new constitution three judges were provided for, to be elected by the Legislature for a term of twelve years, and it was not until 1853 that by an amendment of the Constitution judges of the Supreme Court were elected by the people.

The Legislature elected as the first members of the court provided by the Constitution of 1834 Nathan Green, William B. Turley and William B. Reese. These three are still spoken of as the great triumvirate and justly so for the clear and able disposition of the difficult questions which were brought before the new judiciary. The decisions of this court from 1835 to 1847 are still cited and referred to with confidence by the lawyers of the present day. Of the early judges of the Supreme Court, John Catron became a justice of the Supreme Court of the United States by appointment of President Jackson in 1837. He was the first of the five Tennesseans who have served on that great tribunal, the others being Howell E. Jackson, Horace H. Lurton, Edward T. Sanford and James C. McReynolds.

After the great conflict between the states from 1861 to 1865, it was realized that it was necessary to frame a new constitution, hence our Constitution of 1870, which is still our constitution of today. This is the sixth great event in our judicial history. Under this constitution the Supreme Court consists of five judges, not more than two of whom can come from any one of the grand divisions of the State and, as you know, they are elected by the people for terms of eight years. Many able and outstanding judges have served as members of the Supreme Court since 1870. I have not time to even give the names of all of the eminent judges who have occupied our Supreme Court and appellate court benches since 1870. I will take time to name the chief justices. They are the Honorables A. O. P. Nicholson, J. W. Deaderick, Peter Turney, Horace H. Lurton, Benjamin J. Lea; David L. Snodgrass, W. D. Beard, John K. Shields, M. M. Neil, D. L. Lansden and Grafton Green, our present Chief Justice.

The business of the Supreme Court following the Civil War was exceedingly heavy and the Court found itself unable promptly to dispose of its dockets. Resort was had to several expedients to assist the court; among others was the creation in 1873 of courts of Arbitration and in 1883 of courts of Referees. Still, with these aids, the Court fell behind with its work.

In 1886 a new court was elected. This court went upon the bench with a mandate from the people to clear the docket. With grim determination the court set

about accomplishing this task and, in a few years' time, was able to come abreast of the docket. To bring about this result the court adopted new rules of procedure, lengthening the hours for holding court, limiting the time for argument and was compelled, of necessity, to decide many cases from the bench. In its first year of work it disposed of 1822 cases. The severe labor of this court was probably responsible for the death of two of the judges.

As the population and business of the State increased, however, so likewise the number of appeals to the Supreme Court increased and hence it was there was created in 1895 the Court of Chancery Appeals to assist in lightening the burden of the court. This court rendered splendid service and was succeeded, in 1907, by the Court of Civil Appeals and, in 1925, by our present Court of Appeals, which consists of nine judges, three from each grand division of the State. The present system has worked with great satisfaction to the bar and people of the State and appeals are now promptly disposed of. The present system has also given the Supreme Court more opportunity and time for consideration and decision of the important cases going to that tribunal.

It is a far cry from the Court of the Wautauga Settlement of 1772, holding its sessions in a rude log house, to the Supreme Court and Court of Appeals of today.

While the courts of today have appointments, surroundings and facilities which were totally lacking in the early days of the State, yet we are proud of the fact that the same principles of equal and exact justice and liberty under the law which were established by our forefathers are still preserved inviolate by our appellate courts of today.

The history of our Supreme Court and Appellate Courts is an inspiring one. Positions on these courts have been filled by men of unimpeachable integrity and character and impartiality and, in most instances, by men of great learning and ability. We are justly proud of our appellate courts and their history. Our laws for the election of judges have been so framed as to remove the judiciary as far as possible from partisan politics. Everyone who enters this building will do so with the knowledge that justice is here administered, that the personnel of litigants and counsel is put out of view and ignored and that cases will be decided justly and in accordance with the law and the facts.

A free, fearless and independent judiciary is the cornerstone of our government. We have been peculiarly blessed in Tennessee with a judiciary of that character. The proprieties of this occasion are such that I should not mention the work of the judges who will occupy this building. I can with propriety and truth, however, state that the judges who will sit in this building have the full respect and confidence of the people of the State and of the bar and, in addition, I think there is a real affection for them on the part of the bar.

Surely some lesson is to be drawn from the exercises on this very memorable occasion. It is something more than merely celebrating the completion of a building. The occasion has been in vain unless it has rekindled and strengthened and stimulated our love for our State, for our Constitution and for our judiciary. So I conclude, in the words of the court crier,

"God save these Honorable Courts."

REORGANIZATION OF FEDERAL COURTS BY CONSTITUTIONAL AMENDMENT

BY HON. CHARLES O. ANDREWS
United States Senator from Florida

SENATE JOINT RESOLUTION 100 introduced by me on March 12th, revised on June 6th, and reintroduced on August 20th, seeks to amend Section 1 of Judicial Article III of the Constitution, to provide in substance as follows:

First: That the Supreme Court shall consist of a Chief Justice appointed from the United States at large and ten Associate Justices to be appointed one each from the territory composing respectively the ten Circuit Courts of Appeal as now or may hereafter be defined by Congress.

Second: That any Justice or Judge having served ten years *may* retire upon attaining the age of seventy, and that all Justices and Judges, except those serving at the time of the ratification of this amendment, *shall* automatically retire upon attaining the age of seventy-five years, with continued compensation; and

Third: That the respective Circuit Courts of Appeal shall be composed of at least one Judge from each State included within the territory comprising such Court.

Referring briefly to the *first* major objective, it is our contention that such an apportionment of Associate Justices to the territories composing the respective Circuit Courts of Appeal was evidently intended by the drafters of the original Constitution, and indeed has its basis in our historical background. Our form of government being a representative democracy operating under a limited Constitution, the people are more conscious now than ever that the personnel of our Federal appellate courts should be more nearly representative of the major sections of our broad domain. Judges, like other human beings, are by nature creatures of environment, and in that very fact largely rests our strength rather than our weakness. Such a composite Court would thus be better qualified to pass upon legal issues involved in constantly changing conditions in every great section of the United States.

Perhaps through no effort of theirs, at least six members of our present Supreme Court were appointed from the northeastern financial and industrial section of the United States. Two were appointed from the Northwest and since this resolution was introduced an Associate Justice has, for the first time in over a quarter of a century, been appointed from

the southern half of the United States. That great agricultural territory lying south of the Mason and Dixon Line (extended) from the Atlantic to the Pacific Coast is inhabited by more than sixty million people. This great section is now asking to become something more than just a province of the United States in that department of our Government where the final scales of justice are applied to those sacred human rights of life, liberty and property.

This distribution would be made to the ten Circuits automatically and gradually only as vacancies occur in those offices which are now held under life tenure, by appointment from an unrepresented Circuit. Only the Second Circuit, composed of New York and Vermont, now has more than one (three) Associate Justice on the Supreme Court—Chief Justice Hughes being in the status "from the United States at large."

History shows that our Supreme Court has been increased in nearly all instances when there was an increase in population coupled with expansion of territory. The first increase over the original six was under Jefferson, following the admission of the three new States of Ohio, Kentucky and Tennessee to the Union, whereupon a new Judicial Circuit was created and a seventh Justice added to the Supreme Court. During the next thirty years the Middle Northwest States secured the establishment of another Circuit, and thereupon the Supreme Court was increased from seven to nine members. By 1863 our Western frontier had reached the Pacific Coast, when a tenth member was added to the Supreme Court. When General Grant became President the Court had, by death or resignation, been reduced, for alleged political reasons, from ten to eight members under an act passed following the close of the Civil War. In 1869 Congress again fixed the membership at nine. It has so remained for the past sixty-eight years, although our country has almost trebled in population. By 1920 the Supreme Court docket had become so congested that an act was passed which restricted the right of appeal to about twenty-five percent of the cases usually reviewed by the Supreme Court. The average American does not look with favor upon such a restriction of his right of appeal to our Court of last resort.

Neither patriotism, brain nor ability is confined to State lines. An examination of the record will disclose that there are twenty-two States which have never had one of their citizens on the Supreme Court; Pennsylvania alone has had six; Ohio, seven; and New York, twelve. It has been seventy-seven years since Virginia, the mother of Presidents, has seen one of her sons on the United States Supreme Court. The great agricultural and livestock States of Illinois, Iowa, Kansas, Indiana, Missouri and Nebraska—this great Empire of the Middle West, with great cities like Chicago, St. Louis, Kansas City, Des Moines, Omaha and Indianapolis, to mention only a few—have not had a Supreme Court Justice from that area for more than a quarter of a century.

This proposed amendment not only makes our highest court a more representative body, but its number definite. If ratified it can never again be charged that the Supreme Court is being "packed" or "unpacked" by any proposed statutory enactment.

The *second* part of this proposed amendment provides that Judges serving for at least ten years *may voluntarily retire* upon attaining the age of seventy years, and that all Judges, except those serving at the time of the ratification hereof, *shall automatically retire* upon attaining the age of seventy-five years on the same annual compensation.

While some Judges have served on the bench after the age of seventy-five with marked ability and undiminished mental vision and powers, it is equally true that those instances may well be considered as exceptions, and it is logical to assume that exceptions should never constitute the rule. For example, the records show that the average number of opinions written during the past two years by Justices less than seventy-five years of age was forty, and for those over seventy-five only twenty. Also that the average for those less than seventy years of age was forty-two, and for those over seventy, twenty-three. In fairness, it should be remembered that each participating Justice, whether he be the author or not, reviews all opinions carefully before they are rendered.

Based evidently upon experience, our distinguished Chief Justice has suggested compulsory retirement of all Judges at seventy-five, giving as his reasons "that the importance in the Supreme Court of avoiding the risk of having Judges who are unable properly to do their work and yet insist on remaining on the bench is too great to permit chances to be taken. . . Under present conditions of living, and in view of the increased facility of maintaining health and vigor, the age of seventy may well be thought too early for compulsory retirement. Such retirement is too often the community's loss. A compulsory retirement at seventy-five could more easily be defended."

The *third* objective sought is that the respective Circuit Courts of Appeal shall be composed of *at least* one member from each State composing the Circuit. That Court is indeed the Court of last resort for about nine out of every ten important Federal cases. It will, of course, permit the populous States of New York and Pennsylvania to have more than one member on the Circuit Court of Appeals of which they form a part.

Naturally, any *statute* enacted at this or any other time without these proposed constitutional powers would be either void or *subject to repeal* by any subsequent Congress, and thus subject the whole matter to controversy again at a time perhaps when it would be even more disturbing than at present. We should build our institutions of justice upon solid rock and not upon sand, to be washed away perhaps by a subsequent Congress.

By allowing the people of the United States themselves to make these three contemplated changes, not only will Congress undoubtedly secure the confidence of our people but our Courts will inspire the respect needed to insure a more sympathetic, expeditious and efficient administration of justice throughout the United States, which has for many years been the subject of much adverse criticism not only from those in high positions in the Executive and Legislative Departments, but those in highest judicial authority as well.

We certainly can gain much and lose nothing by submitting this amendment. The Constitution provides a way for us to forever settle these three disturbing questions through an orderly process, of the justice of which there can be no serious doubt.

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

Among Recent Books

"*THE LIVERPOOL TRACTATE": An Eighteenth Century Manual on the Procedure of the House of Commons.* Edited with an Introduction by Catherine Stratemen. 1937. Columbia University Press. Pp. xcii, 105.

This hitherto unpublished treatise was found in the Liverpool papers in the British Museum, and, although the evidence is slight, is believed to have been written by Charles Jenkinson, first Earl of Liverpool. It is one of many of the same nature written in the course of the centuries through which Parliament has developed. As a manual it has now no practical value to speak of, but its publication is worth while for its help to anyone interested in studying the development of parliamentary procedure. The introduction, however, longer than the tractate itself, is an important contribution to the somewhat scanty literature on the subject. After telling us about the earlier tractates—a word instead of which we should say "Manuals." by reason of the "Manual" prepared by Thomas Jefferson for his use in presiding over the Senate when he was elected Vice-President—the editor treats of development between 1689 and 1760, a period in which little on the subject was written.

This, and indeed the whole book, may seem unimportant to those who have had little or no occasion to study the subject, but the matter is of more consequence than would appear on the surface, for it is interwoven with the growth of English liberties, and hence of our own. While the first purpose of parliamentary law is to ascertain and accomplish in an orderly manner and with reasonable speed the will of the majority, English-speaking peoples now deem it of hardly less importance to protect the minority. We have come to believe that only by this can we escape the resentments that breed revolutions. Development of such protection progressed during this period when government was shifting to the floor of the House, but the reader must not expect to find it with dramatic episodes. It was matter of minutiae, but so for the most part freedom slowly broadened down from precedent to precedent.

To one actively engaged in American lawmaking, the most interesting thing in the story of the House of Commons in that period is the hesitancy with which the House worked out the committee system. It is to be hoped he will not be thought irreverent if he avows the belief that our English brethren have not even yet accomplished therein what has been accomplished on this side of the water. Our unique system of numerous small standing committees has distinct advantages. Small groups of men working under conditions that minimize partisanship, and that in executive sessions, where the vital work is done, permit patriotism to be unhampered by publicity, at least in the matter of the administrative problems that constitute far the greater part of the work of our lawmaking bodies, produce the desirable results that alone permit these bodies to survive.

The painstaking and thorough treatment of the subject merits commendation, and an excellent bibliography will add to the gratitude of whoever wishes to pursue farther the study of parliamentary procedure.

ROBERT LUCE.

Washington, D. C.

Renvoi in Modern English Law; by Albrecht Mendelssohn-Bartholdy, Edited by G. C. Cheshire. Oxford: the Clarendon Press, 1937; pp. xiv, 87.—From great musician to great legal thinker in two generations seems a long tour; and when to that is added the fact that the intermediate generation produced a general in the German army, we can wonder even more at the adaptiveness of the Mendelssohn family.

Albrecht Mendelssohn-Bartholdy was long one of the distinguished jurists of Germany. Like his distinguished grandfather, he always had an interest in English affairs, and this book shows him as a great English common-lawyer.

After his exile from Germany he found a haven in Oxford and there continued his studies in the Conflict of Laws. The Doctrine of the Renvoi is one of the most fundamental and the most puzzling of all the nice questions raised by the conflict of laws. In England, the earlier courts, without realizing what they were doing, had, in the language of the writers on the Doctrine, accepted the Renvoi without knowing it.

At last, in 1926, in the case of *In re Annesley*[1] Mr. Justice Russell, examining the Doctrine, expressed an opinion against the acceptance of it which seemed to make the law of England clean of it. In later cases, however, *In re Ross* and *In re Askew*[2] were thought to have revived it again. These cases form the basis of this monograph of Mendelssohn-Bartholdy. He also adds an examination of all the many cases in which a similar situation has occurred when no suggestion of renvoi was made by the courts. His final conclusions, namely, that the Doctrine of the Renvoi is no part of the English law, seem quite justified by his most lawyer-like arguments.

It is refreshing to see this subject so sensibly treated. No one but a man who knew at once the law of the Continent and the English law could have put his case so well.

An introduction by Mr. Cheshire affords us a val-

1. In re Annesley [1926] 1 Ch. 696.
2. In re Ross [1930] 1 Ch. 377.
   In re Askew [1930] 2 Ch. 259.

uable sketch of Mendelssohn-Bartholdy's position in the modern law. JOSEPH H. BEALE.

Law Revision Commission of the State of New York: Annual Report for 1937: *Recommendations and Studies.* Albany: Legislative Document (1937), No. 65, pp. 1070.

Judicial Council of the State of New York: Annual Report for 1937: *Judicial Statistics, Recommendations and Studies.* Albany: Legislative Document (1937), No. 48, pp. 327.

These two reports eloquently testify to the seriousness with which the State of New York is going about the modernization of both the body of its laws and its system of judicial procedure.

The field of jurisprudence has been divided into two parts—substantive law establishing rights and liabilities, and procedural law providing ways and means for judicial administration. To deal with these two departments of the law two permanent official bodies have been created—the Law Revision Commission and the Judicial Council.

The duties of the Law Revision Commission are to examine the common law, statutes and judicial decisions in order to discover defects and recommend needed reforms, to consider changes proposed by the American Law Institute, to receive and consider suggestions from lawyers, judges, public officials and the general public as to needed changes in the law, and to recommend from time to time such reforms as will bring the law into harmony with modern conditions. The Commission maintains its own research organization, under the direction of John W. McDonald.

The duties of the Judicial Council are to make a continuous survey of the organization, jurisdiction, procedure and practice of the courts of the state, collect and compile judicial statistics, and recommend such improvements as are required to make the courts more efficient agencies for the administration of justice. The Council maintains its own research organization, under the direction of Leonard S. Saxe.

The two reports issued by these advisory bodies in 1937 are encyclopedic in their range and thoroughness.

The Law Revision Commission presents proposed acts, recommendations and exhaustive supporting studies dealing with the rights and liabilities of undisclosed principals under sealed instruments, the registration and transfer of corporate securities, the effect of an agreement to accept a stipulated performance in satisfaction at some future time, certificates of designation by business trusts and joint stock associations, installment land contracts, the recording of land contracts, sexual crimes, homicide, discharge of sureties, and various problems arising out of the administration of the assets of decedents' estates.

The Judicial Council presents very complete statistical tables of the usual type relating to the business done by the courts of the state, and recommendations with supporting studies dealing with the waiver of juries in criminal non-capital cases, emergency assignments of judges to other courts, abolition of struck and special juries, simplification of certiorari, mandamus and prohibition, pre-trial procedure, permitting comment on the failure of a defendant to testify in a criminal case, service of process by registered mail, the scope and form of the record on appeal, and costs in civil actions.

While some of these studies are largely confined to New York authorities, many of them cover a wide range, include excerpts or summaries of statutes from the various states, and are well documented with references to textbooks and recent articles in legal reviews. Published studies of this kind would be of great value in other states where similar problems exist if they were more readily accessible. But they are usually difficult to locate because there is no general index of such material to be found in the libraries of courts, bar associations, law schools and law offices. One of the pressing needs of the day is a current descriptive list or digest of material of this type appearing in the reports of commissions, judicial councils, bar committees and other bodies, which will make them as easy to find as law review articles and judicial decisions. In default of an adequate digest the influence of such studies in other jurisdictions will be greatly restricted and there will be a vast amount of unnecessary duplication of research efforts.

EDSON R. SUNDERLAND

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A History of American Political Thought From the Civil War to the World War, by Edward R. Lewis. 1937. New York: The Macmillan Company. 555 pages.

In this volume, which is literally indispensable to lawyers, as to educators and thoughtful citizens generally, the author studies the whole stream of our political thought for the period 1865-1917. Necessarily, some of the questions dealt with receive less elaborate treatment than others, but in no instance is the discussion vague or too general. Among the topics considered are the so-called Civil-War amendments of the federal constitution; their development in actual litigation; the control of legislation and executive policy by the judiciary—a very "burning" issue just now—the Reconstruction measures; the legal tender and income tax cases; the granger laws and the Populist and labor proposals; the Progressive movement and the Wilsonian New Freedom program, and, finally, the impact of Henry Georgeism, Socialism and the American variety of Syndicalism as represented by Haywood and the I. W. W.

Mr. Lewis is eminently fair and reasonable in his estimates and conclusions. He renders judgment rather briefly, after a careful study of the arguments for and against a measure or a proposal. He notes, naturally, the tendency of partisans and political campaigners to exaggerate, to point with alarm or, on the other hand, to promise millennial results. The truth is, political debates are seldom genuinely educational. Heat obstructs the passage of light. The debaters are too angry or too prejudiced to do justice to any view they dislike. And, in addition, too many of the debaters are politicians and office-seekers with axes to grind or direct pecuniary stakes in the issues upon which the voters are to render decisions.

What nonsense, for example, was indulged in, on both sides, in the long contest over the woman suffrage issue! What is the verdict of experience in connection with the referendum, prohibition—or the repeal of prohibition—commission government in the utilities

field, the direct election of senators, the direct primary, and the like?

It has been said that what history teaches is that history teaches us nothing. There is much truth in this. Human passions and human interests are too powerful to be seriously curbed by alleged lessons from the past—lessons, moreover, which admit of different interpretations. Still, there are times when bias is relatively silent and the mind is open and receptive. There are elements in a nation which seek the truth and cherish it. It would be foolish to despair utterly of the role of reason in national and international affairs, even though progress is not continuous and steady.

Mr. Lewis has written a book of real value and importance. It is philosophical, tolerant, exceedingly well-documented, and highly instructive. Objection will be taken to some of his observations or conclusions. The Marxian Socialists will not relish his treatment of their dogmas and claims. The assailants of the United States Supreme Court will take exception to his calm and moderate summing up of the discussion of the Judicial Veto, or of the Theodore Roosevelt suggestion, nearly a generation ago, of a popular review of decisions in State Police-power cases. A majority of his readers, however, will find him a safe, detached, sagacious and reliable historian and thinker. And they will be grateful for the amount of information he presents and the clear, interesting and spirited style in which that information is conveyed.

VICTOR S. YARROS

Chicago.

Machine Politics: Chicago Model. Harold F. Gosnell. 1937. Chicago: The University of Chicago Press. Pp. 229.

This book by a scientific student of government who is also thoroughly realistic and practical in his approach and methods is a valuable and much-needed contribution to our knowledge of machine and spoils politics, of the sources of machine power, and the opportunities now open to friends of good government in their long and too often unsuccessful efforts to undermine and defeat the forces of corruption and evil.

Chicago is a typical American cosmopolitan community. Findings for Chicago are substantially applicable to many other, similar communities in the country, whether larger or smaller than the western metropolis.

The question put and answered by Prof. Gosnell is briefly this: What has happened in Chicago, politically, in the seven years of the depression which elsewhere is known to have precipitated drastic or important changes? Have our politicians learned anything, forgotten anything, taken certain lessons to heart, or have they simply reduced the scale of their operations by reason of the urgent demand for economy in government? Has federal co-operation given them new ideas and new modes of organization? If not, must the attitude of the high-minded citizen be defeatist?

The conclusions reached by Prof. Gosnell are not unduly optimistic, but he does not despair of urban politics and urban democracy. True, the character of our party system has remained basically the same, despite overwhelming Republican losses and unprecedented Democratic gains. Few of our bosses and professional politicians are new-dealers, and all they want from the federal government is spoils—grants, loans, jobs.

Was Thomas Jefferson right, then, in his gloomy views of urban democracy? Is there no hope of progress in urban politics? Prof. Gosnell believes that there is hope. He writes:

"In the past seventy-five years or so, the machine voters have been recruited for the most part from the ranks of the unadjusted foreign-born groups, the unassimilated immigrants from the rural areas, the transient workers, and other such elements. The sinews of campaign warfare came from the robber-barons of American industry, particularly the real estate and utility magnates."

But immigration has been cut off, the birth-rate in the lower-income groups is declining, labor is organizing millions of the unskilled, utilities are being regulated more effectively, campaign contributions are watched, and civic training is improving—albeit slowly.

We must all work for the merit system, for the control of monopoly, for the elimination of grand larceny from big business, for better mass education, and for cleaner elections. Democracy need not fail in our urban centers. City and county governments can be reconstructed, and party leadership elevated and rendered attractive to disinterested and faithful men and women.

VICTOR S. YARROS

Chicago.

The Delaware Corporation. By Russell Carpenter Larcom. 1937. Baltimore: The Johns Hopkins Press. Pp. vii, 199.

This book is disappointing. High hopes are raised by the announcement of a study of the Delaware corporation, written by a professor of economics and published by The Johns Hopkins Press under a grant from the Lessing Rosenthal Fund for Economic Research. But five of the seven chapters contain merely a very brief, loosely organized, and largely uncritical discussion of important topics of corporation law as illustrated in statutes and decisions relating to Delaware corporations. There is neither the exciting style nor the acuteness which characterized Berle and Means, *The Modern Corporation and Private Property*, although Mr. Larcom has much the same point of view. One example will suffice. Dealing with changes in the rights of shareholders by charter amendment, Mr. Larcom observes that such changes have been of three kinds: "changes in preferences, in specific rights, and changes in vested or property rights." Corporation lawyers have long known how to manipulate these categories with a straight face; but one would expect an economist to add either illumination or critical appraisal of the adequacy of such classifications. Mr. Larcom has made no serious attempt in this direction and his book is thus of slight value to either the lawyer or the student of society. The first chapter presents a brief but interesting sketch of the history of Delaware corporation statutes; the last deals statistically with the extent of the practice of Delaware incorporation and with its effect upon the public finance of the state.

WILBER G. KATZ

University of Chicago.

The Sources of Modern International Law, by George A. Finch. Foreword by James Brown Scott.

1937. Washington, D. C.: The Carnegie Endowment for International Peace. Pp. VII, 124.

Few questions of international law have been the subject of more unsatisfactory writing than the sources of that law. This has been due in large part to the lack of a precise and generally accepted terminology, as a result of which "sources" are often confused with "origins," "bases," "causes," "repositories," "factors which have contributed to the growth of international law," etc. Mr. Finch in these lectures, delivered at Ann Arbor and (in French) at the Hague Academy of International Law, has endeavored to avoid this confusion by distinguishing sources in the true sense of the term from other things which are not really sources but which have frequently been treated as if they were. After a brief examination of the principal factors and events which have accelerated the development of international law he considers in turn its sources: the law of nature, the writings of publicists and scholars, custom, treaties and conventions and the decisions of courts and tribunals, both national and international. He pays a just tribute to the great influence exerted by the law of nature upon the development of international law before the triumph of positivism and shows that some of its most universally accepted rules had their origin in what mediaeval civilians regarded as natural law. In his discussion of text writers as sources Mr. Finch, for some reason, limits himself to modern authors, beginning with G. F. de Martens (1756-1821) and ending with Oppenheim (1858-1919). In his evaluation of custom as a source he very properly points out that it is a mistake to endeavor to draw too sharply the line of demarcation between custom and treaties since treaties are often merely declaratory of the existing customary law.

Considering treaties as being today the most important source of international law, he reminds us that it is only within recent times that this has come to be the case. Adverting to awards and decisions of international tribunals as one of the most important contemporary sources of international law he calls attention to the fact that it is only since the beginning of the twentieth century that the collection and publication of these decisions has made available for the profession this body of important source material.

It may be true as Mr. Finch modestly asserts that in this study he has only "scratched the surface" but it can be said that within the scope of his task he has made a useful contribution to the literature of international law.

JAMES W. GARNER

University of Illinois.

The Records of the Federal Convention of 1787. Edited by Max Farrand. Revised edition, 4 vols. 1937. New Haven: Yale University Press. Pp. Vol. I-606; Vol. II-667; Vol. III-630; Vol. IV-230.

The reappearance of this, the most definitive edition of the records of the convention of 1787 which has long been out of print, is a welcome and important contribution to the sesquicentennial of the constitution. It has been enriched by the addition of considerable new material and many corrections and minor alterations of phraseology which make it an even more accurate reproduction of the original documents.

The fourth volume, which is added to the original three in this edition, contains some eighty pages of new materials or alternate readings of materials already included which have come to light with the opening of new archives or with further research in the standard documentary collections. Dr. Farrand points out that the two most important series of notes and documents newly discovered, found among the papers of John Lansing, Jr., of New York, and Charles Cotesworth Pinckney of South Carolina, are not yet available for publication. Until they are, a general re-editing of the day-to-day records of the convention would add little of importance. In the meantime, scholars and students of our constitutional history will welcome the appearance of this new edition with the supplementary materials here made available.

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The Problem of Peaceful Change in the Pacific, by Henry F. Angus. 1937. London and New York: Oxford University Press. Pp. vii, 193.

The Institute of Pacific Relations is doing pioneer work in exploring the economic, social, and political problems of the countries on the Pacific Rim. Its technique of individual research by the ablest students in the different countries of a given problem and of collaboration and round table discussion among them in the final stages of drafting their reports and presenting their data insures the impartiality and substantial authority of their findings. This volume summarizes the work of the Institute since its foundation in 1925. The wide range of the questions analyzed by its members and the experts is indicated by the variety of topics considered. They run all the way from immediately controversial issues, such as the Japanese protest against Chinese boycotts and Chinese demands for tariff autonomy and the abolition of exterritoriality, to the longer-range studies of such problems as land utilization and industrialization in the Pacific countries, trade and tariff policies, and differential standards of living. Here, in less than two hundred pages, is a veritable spectrum of the issues confronting the nations facing the Pacific, and a conspectus of the available information about them and of varying national attitudes toward them. It is a convenient introduction to a study of one of the most significant regions of tension in the international relations of today and tomorrow.

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The Legal Status of Aliens in Pacific Countries. Edited by Norman MacKenzie. 1937. New York: Oxford University Press. Pp. xii, 374.

This cooperative study of the law and practice concerning immigration, naturalization and deportation of aliens and their legal rights and disabilities covers the eleven countries on the Pacific Rim, with the exception of the Latin American States. Initiated by the Institute of Pacific Relations, it includes specialized studies on the law relating to aliens by leading members of the bar and other experts in each of the countries covered. For the United States, the chapter is contributed by Professor Joseph P. Chamberlain. Strictly factual and objective, the volume provides the most important source at present available on the legal and administrative aspects of the treatment of aliens in Australia, Canada, China, Indo-China, the Pacific dependencies of Great Britain, Japan, the Netherlands Indies, New Zealand, the Philippine Islands, Russia, and the United States. The full citations to the statutes and cases of the different jurisdictions make this study of special interest to the lawyer. In a brief but illuminating introduction, Professor Norman MacKenzie of Toronto University indicates some of the perplexing

conflicts of law and policy in this still highly-charged area of international relations.

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International Legislation, by Torsten Gihl. 1937. New York, London, and Toronto: Oxford University Press. Pp. 158.

This essay by a distinguished international lawyer is one of the most significant contributions which has yet appeared in English to a field becoming steadily more important to the development of peaceful procedures of international change. It is a commonplace that international society lacks the primary machinery of a legislature for the continuous modification of statutory law to conform to changing conditions. International treaties—the most general type of legislation in the international field—suffer from their comparative rigidity. Various doctrines such as *pacta sunt servanda* and *rebus sic stantibus* have been elaborated to define the interpretation of treaties in the light of changing conditions. But they are at best only inferential rules which provide incidental escape from intolerable dilemmas, or criteria for the maintenance of the status quo. They suffer further from the as yet very inadequately defined distinction between legal and political disputes. The result is that in fact judicial tribunals perform what is in reality a legislative function—the interpretation of words (or their modification) to fit the actualities of a contentious situation.

It is to an analysis of this dilemma that the author devotes these interesting pages. He is a positivist and rejects the conception outlined above of what international tribunals are actually about when they give, for instance, a judgment *ex aequo et bono*. He asserts the proposition, which he buttresses with an elaborate and cogent argument, that the business of legislation is essentially a matter of state action consciously undertaken for the purpose of creating new rules of international law. Until such changes have taken place he considers that equitable judgments by international courts are likely to do more harm than good because they are apt to reflect the political interest of the stronger party. His analysis runs counter to contemporary ideas of the naturalist school represented by such writers as Lauterpacht, but it is an analysis which cannot be neglected or ignored in the search for a sounder basis of respect for rules of international law as guiding principles of interstate action.

Amherst College. PHILLIPS BRADLEY

The Settlement of Canadian-American Disputes, by P. E. Corbett. 1937. New Haven: Yale University Press. Pp. 134.

This book, by the dean of the faculty of law of McGill University, is a history of the settlement of the disputes which have arisen between the United States and Great Britain and Canada beginning with the Treaty of Paris, 1783. The author does not follow the chronological order of these settlements but arranges them according to subject matter. The headings chosen by him are: 1. Settlement of the boundaries; 2. Fisheries; 3. Inland water ways; 4. Miscellaneous claims. Under the title "Boundaries," he describes the controversies and settlements affecting the boundary between the United States and Canada beginning with the St. Croix River Dispute arising in 1789 and ending with the Alaska Boundary, 1903. With reference to "Fisheries," he gives a history of all the controversies relating to the vexed question of fisheries beginning with the Bay of Fundy, 1856 and ending with the Bering Sea Fur-Seal Arbitration of 1893. The chapter on "Inland Water Ways" has to do with the events which led up to the appointment of the International Joint Commission, for the regulation of boundary waters. The chapter on "Miscellaneous Claims" has to do with the settlement of the various controversies which have arisen between the two countries, which are not included under the preceding headings. There is also an account of the disputes which arose in connection with the Prohibition Amendment, including the famous case of the "I'm Alone."

The author then enumerates some of the contributions to International law and Procedure resulting from the Canadian-American arbitrations.

A most interesting part of the book is the description of the existing machinery of settlement between the two countries. The author points out that the Hague convention of 1899, and the revising convention of 1907 to which Great Britain and the Dominions are not parties, merely provide an organization which can be used if States decide to arbitrate, and that the general arbitration treaty of 1908 came to an end through failure of renewal in 1928. Again the compulsory jurdisdiction of the International Joint Commission is restricted to diversion, obstruction, and new uses of boundary waters, whose function of investigation extends only to questions arising along the common frontier. The Bryan Treaty of 1914 prohibits war over any dispute before investigation by a permanent international commission has been completed, but leaves the parties free to take what action they please when that commission has submitted its report. The Pact of Paris, he asserts, is stultified by reservations which except areas of special interest and embody an illimitable concept of self-defense. This leaves an uncertain and rather unsatisfactory situation. To remedy this the author urges that a general arbitration treaty between the two countries should be enacted which would provide for the settlement of all disputes.

The book is condensed and compact. It is not easy reading, but it is the best and most concise treatment of this very important subject of which the writer knows. NATHAN P. AVERY

Holyoke, Mass.

Industrial Property Protection Throughout the World, by James L. Brown, Chief, Industrial Property Section, Division of Commercial Law, Bureau of Foreign and Domestic Commerce, U. S. Department of Commerce. 1936. Washington: Government Printing Office. Pp. 184.

Approximately the first half of the publication is devoted to a general discussion of the question of protection of industrial property, that is inventions, trade marks, copyrights, good will, etc., throughout the world, outlining the principal reasons why American manufacturers engaged in foreign trade should protect their industrial property outside of the United States. Many valuable suggestions are included regarding the manner of obtaining the desired protection.

The second part of the publication summarizes the trade mark laws of the various countries which are most important from the standpoint of American foreign trade.

The last portion of the book is devoted to a brief discussion of the international agreements relating to the protection of industrial property. The appendixes contain the text of the various conventions on the subject, to which the United States is a party.

The publication is not intended for the attorney specializing in trade marks, unfair competition, patent

and design, and copyright law, to whom the author refers the reader for more detailed information, but should be of considerable value to American business interests engaged in or contemplating foreign trade and to the attorney who is called upon to advise a client merely in a general manner regarding protection of industrial property beyond the territorial limits of the United States.

BERT M. KENT
Cleveland.

Cheque: Guia Bibliografica e Indice Legislativo, by Ignacio Winizky. 1936. University of Buenos Aires Faculty of Law and Social Sciences. Pp. 202.

This volume is a bibliographical guide and notice of legislation in the various countries of the world on the subject of checks. The bibliography is divided into sections on general works, on the concept of the check, including its historical evolution, economic function and juridical nature, on the steps in the life of the check, a general section on special situations, including the results of robbery, loss and bankruptcy, and sections on different sorts of checks and the relation of the check with other branches of the law, notably the criminal law and taxes. This section of the work contains an extensive bibliography on the international regime of checks.

The general bibliography is conveniently arranged, both under names of authors and under names of the countries. It covers a wide field and would be of use to a person who needed a bibliography on this special subject. It includes not only books but many doctoral theses and articles from periodicals. The collection of books contains many of a general character which refer to the use of the check, such as French treatises on commercial law and American books on the Federal Reserve System. It is not a serious criticism to say that in attempting to provide so complete an instrument of research the compilers have not included a number of articles in American periodicals, and even some books on the subject. The number of titles collected and the care given to their arrangement are evidence enough of the diligence and skill of those who have prepared this bibliography. The titles of the various books are given in the language in which they are printed. The reviewer notes that both the English spelling and the translation might be improved.

The work has been prepared under the auspices of the Section on Publications of the Seminario de Ciencias Juridicas y Sociales, which plans similar bibliographies on other subjects.

JOSEPH P. CHAMBERLAIN
Columbia University.

Marriage and Divorce, by Leon R. Yankwich. Los Angeles: Graphic Press. 1937. Pp. 97.

Judge Yankwich has provided for his readers a brief discussion of the marriage and divorce law of California and its nearest neighbors, particularly Nevada and Mexico. It is based largely upon his own personal experience and is therefore touched with bits of irony and humor as well as reflections on the difficult problem of the conflict of laws. The whole treatment of this problem by Judge Yankwich illustrates clearly the constant need for a humanistic kind of statesmanship on the part of the courts in handling this grave crisis in the lives of human beings. Quite apart from the text, it should be added that this little volume is a model of fine printing and book-making.

ARTHUR J. TODD
Northwestern University

Constitutional Law, by Hugh Evander Willis. 1935. The Principia Press. Pp. viii, 1198.

This work starts with the statement that the Constitution of the United States is a codification of the British law and government and of colonial experience "with a new technique introduced by the Constitutional Convention, and with the whole transformed by the Supreme Court," and that in its present structure it represents six periods and seven outstanding doctrines, the periods being: 1. the Constitutional Convention period, to which the author assigns two doctrines, viz., the separation of powers into legislative, executive, and judicial branches, and the amendability of the Constitution; 2. the Bill of Rights period, to which the author assigns guarantee of due process as the doctrine; 3. the period of the Chief Justiceship of Marshall, to which the author assigns the doctrine of the dual form of government; 4. the period of Justices Taney, Waite, and Miller, which the author says is characterized by fear of the ascendency of the States; 5. the period of Justices Field and Fuller, during which the author perceives the doctrine of extension of due process of law; 6. the period of Justices Holmes and Brandeis, which the author says is characterized by the growth of the doctrine of the supremacy of the Supreme Court.

The text abounds in very instructive and excellently portrayed treatises on various subjects familiar in constitutional law, and while the writer of this review, who brings to his task the equipment only of the average practicing lawyer, has found it interesting and instructive, its reading has left the impression that its author was more concerned with disseminating his private notions of government and of the Constitution than of making a reliable protrayal of what the Constitution, as it has been construed by the courts, really is; even, it would seem, to the extent of misinformation as to various fundamentals, among others, for example, the misleading assumption apparent ubiquitously in the work, that the amendatory power of the Constitution is in the People of the United States as a whole.

The author criticises the Supreme Court for its construction of due process, and by his language would make it appear that the Court had invented the term "due process," apparently overlooking quite that the term was not placed in the Constitution by the Court but was inserted by the framers of the Constitution and had to be construed by some one. The doctrine of the Supreme Court as applied in respect of this clause, the author contends, has tended to hamper social control, to create uncertainty in the law, to further the establishment of commissions, to over-emphasize property, and to overburden itself with work.

Indeed, it seems not unfair to say that the work is principally dedicated to the propagation of the particular type of socialistic dogma entertained by the author, for the author says that our President has not gone far enough with his theories; that social planning is necessary; and by way of necessary social planning, the author suggests three things: 1. legislation preventing concentration of wealth in the hands of a few; 2. government ownership (apparently of everything), by which the author proposes to furnish employment; and 3. the prevention of debts, to be accomplished in two ways,—by prohibiting loans for non-productive purposes on the one hand, and on the other hand, by reducing the rate of interest to a point where it would be unprofitable to lend money.

ELMER M. LEESMAN
Chicago

Summaries of Articles in Current Legal Periodicals

BY KENNETH C. SEARS
Professor of Law, University of Chicago

ADMINISTRATIVE TRIBUNALS

Shaping Judicial Review of Administrative Tribunals, Ralph M. Hoyt, 16 North Carolina L. Rev. 1. (D. '37; Chapel Hill, N. C.)

A short time ago much was heard of a national administrative court. The address by Mr. Hoyt, who was a member of the special committee on administrative law of the American Bar Association during 1936-37, explains what happened to that idea. The proposal of the 1936-37 committee dropped the separate court idea in favor of legislation that would control many administrative activities of the national government by affording additional judicial and quasi-judicial relief. The address is short and clear and it also contrasts judicial control over administrative activity in Wisconsin and North Carolina. What will the new committee on administrative law do with the report of the preceding committee? The most important part of that report was adopted by the House of Delegates by the close vote of 55 to 51.

BANKRUPTCY

The New Frazier-Lemke Act: A Study, Z. N. Diamond and Alfred Letzler, 37 Columbia L. Rev. 1092. (N. '37; New York City)

Aside from the brief consideration of the history of the new act, a reader will find what appears to be a thorough consideration of the questions that have arisen or are likely to arise in the interpretation of the act. The reading is tough as is usual when the precise wording of a statute is involved. A specialized knowledge of bankruptcy law, or a copy of the general bankruptcy act including the new act at hand for frequent reference probably will be essential to a clear understanding of the article. By that time the reader may be in a position to agree with the authors that the new act "is obviously not well drawn legislation" and that the success of the new act will depend upon the unknown quality of the administration that it will receive by conciliation commissioners and judges.

CONSTITUTIONAL LAW

Separability and Separability Clauses in the Supreme Court, Robert L. Stern, 51 Harvard L. Rev. 76. (N. '37; Cambridge, Mass.)

Legislators and legislative draftsmen should be particularly interested in this good but excessively long essay. The problem has two aspects: (1) "situations in which some *applications* of the same language in a statute are valid and other applications invalid"; and (2) statutes containing particular *language* which is invalid but other language which is constitutional. The first aspect has produced diverse holdings in the Supreme Court but it is a matter of some satisfaction that "none of the statutes held totally void because of the invalidity of some of their possible applications contained a separability clause." Where statutes contained this clause, they have been held valid as far as they could be applied under the constitution. The second aspect is less involved and the formal test has been that if only some language is unconstitutional the remainder of the statutory language can stand alone, if such a result would have been the legislative intention. But this leaves the court "free to decide each case the way it pleases without having its discretion fettered by any restraining doctrine." Indeed the decisions on separability often appear to reflect the judicial attitude toward the merits of a particular statute rather than an objective application of the test. The prevalence of separability clauses in statutes without discrimination by legislators as to the effect of such clauses was followed by court interpretation that made the clauses largely meaningless. This calls for a legislative remedy and the one suggested is that a separability clause "should refer specifically to those sections, paragraphs and provisions of an act or to those applications of it which the legislature really intended to stand alone."

CONSTITUTIONAL LAW

Constitutional Interpretation—The Experience of Canada, W. Ivor Jennings, 51 Harvard L. Rev. 1. (N. '37; Cambridge, Mass.)

A comprehensive consideration of the decisions of the Board of the Judicial Committee of the Privy Council since 1874, which apply the British North America Act of 1867, discloses that the problem of balancing the powers of the Dominion and Provincial governments is similar to the problem in the United States of balancing the national and state governments. Constitutional interpretation by the Board has not been a smooth, consistent pattern. It has been more like the ebb and flow of the tide and has depended upon various factors such as the accident of earlier interpretations, the course of political events in England, and the admonitions derived from the rule of stare decisis. One striking result has been that the provision giving the Dominion power over "the regulation of trade and commerce" has come to mean nothing. Also, despite an apparent intention to the contrary, it has been held that there is a domain where Dominion and Provincial legislation may overlap, "in which case neither legislation will be *ultra vires* if the field is clear; and if the field is not clear, the Dominion legislation must prevail." Even the doctrine of a power in the Dominion to legislate for an emergency has been recognized. Readers who are not familiar with the decisions probably will find this extensive article of thirty-nine pages rather difficult reading but one who is interested in comparative constitutional law should not neglect it.

MONEY AND BANKING

The Law of the Dollar, Arthur Nussbaum, 37 Columbia L. Rev. 1057. (N. '37; New York City).

This article, which will form a chapter in a book to be published, is an excellent survey in an attractive style. First, the legal history of the dollar is discussed and the legislative provisions from Continental days to

1933 are set forth. Then appears an analysis of the legal aspects of the present dollar under the sub-titles of devaluation and silver legislation. Next is a consideration of the constituents of the American monetary system, to-wit: (1) their multifariousness, (2) the unifying process, and (3) silver certificates. Finally the author discusses the constitutional aspects of the American monetary system under these four topics: (1) coins and the constitution; (2) paper money and the negative power of Congress; (3) paper money and the affirmative power of Congress; and (4) the indirect currency power of Congress. Here one finds a summary of the Supreme Court decisions from McCulloch v. Maryland to but not including the Gold Clause Cases.

PROCEDURE

Federal Class Actions, James Wm. Moore and Marcus Cohn, 32 Illinois L. Rev. 307. (N. '37; Chicago, Ill.)

Rule 23 of the Proposed Rules of Civil Procedure for the District Courts of the United States is the basis of this article on class suits. First appears the history and then the prerequisites of such suits which are of three sorts: (1) the true class suit; (2) hybrid class action and (3) the spurious class suit. After a discussion of the right of the plaintiff to dismiss or compromise a class suit, most members of the legal profession probably will be pleased to read the conclusion. "Rule 23 of the Proposed Rules does not deal with class actions in a novel manner. It merely attempts to restate the better practice of the decided cases, particularly federal cases, which have dealt with the subject, in the light of the history and long tradition of the equity courts. Reasonably construed and applied, the Rule should prove valuable to the court and the practitioner."

TRADE REGULATION

Legislation in Restraint of Trade, George B. Clothier, 12 Temple L. Quar. 3. (N. '37; Philadelphia, Pa.)

Despite some repetition, a valuable review of two important legislative developments is presented. The resale price maintenance statutes, commonly known as "fair trade laws," have been passed by Congress and by "more than forty states." They constitute the legislative answer to the decision of the U. S. Supreme Court in the Dr. Miles Medical Company case that a contract in interstate commerce for the maintenance of a minimum retail price violated the Sherman Act. The attack upon the fair trade laws because of due process has failed and the chief economic justification for them is to restrict chain stores which reduce prices in one neighborhood and absorb the loss elsewhere, with consequent damage to the independent retailer. The second development is the Robinson-Patman Act which was passed "to put teeth in the existing price discrimination provision of the Clayton Anti-Trust Act." The act was poorly drafted and much will depend upon its interpretation and upon its administration by the Federal Trade Commission. Both legislative developments tend toward price stabilization and discourage price-cutting. "The emphasis has been gradually transferred from *free* competition to *fair* competition, and the survival of the fittest is becoming a discarded principle, in business law as elsewhere."

TRADE REGULATION

Should the Antitrust Laws Be Revised? Robert H. Jackson, 71 United States L. Rev. 575. (O. '37; New York City.)

The assistant attorney general in his short address presents a ringing challenge to the American people. Forty years of experience with statutes concerning combinations in restraint of trade has left us with no reasonably predictable standards even though some good has been accomplished by anti-trust suits. Yet the choice is whether we shall have regulation by competition as contemplated by our anti-trust laws or the only probable alternative, more governmental control. The latter is made more probable by the decline of competition in certain industries where even the United States is unable to secure competitive bids. Thus, some who complain about public economic planning indulge freely in private economic planning and have brought about rigid prices. This latter group generally made the worst showing in the depression in the decline of their pay rolls. Then, even though the concentration of the ownership and control of industry is fatal to a competitive economy, the courts have said blandly 'size is no offense.' Meanwhile the concentration has reached a very high point. Revision of our antitrust law is thus suggested but no flawless plan is in sight, "and no plan that I can forsee will be able to avoid an increase in governmental activity and control in our economic life."

Leading Articles in Current Legal Periodicals

Air Law Review, October (New York City)—Observations on Comparative Air Law, Howard S. LeRoy; The Uniform State Aeronautical Code, Warren Jefferson Davis; Cities on the Air, Seymour N. Siegel, Air Transport Protection, Linus R. Fike.

Boston University Law Review, November (Boston, Mass.)—The Proof of Claims in a National Bank Receivership, George B. Rowlings; Petrazhitskii—Science of Legal Policy and Theory of Law, Hugh W. Barb; The Right of the Insured to Revoke a Trustee-Beneficiary, Coleman Silbert.

California Law Review, November (Berkeley, Cal.)—Is Hugo L. Black a Supreme Court Justice de Jure? by D. O. McGovney; When Is It Vacant? by E. W. Camp; State Power to Prohibit Interstate Commerce, by J. A. C. Grant; Amendments to California Corporation Laws (1937); Readjusting Stock Structure, by G. L. Sterling, Jr.; Conflict of Laws and Constitutional Law in Respect to Intangibles, by W. M. Simmons.

Canadian Bar Review, November (Ottawa, Ont.)—The Inns of Court, by Hon. Mr. Justice McDougall; The Literal Canon and the Golden Rule, by Professor E. Rus-

sell Hopkins; Court Decisions Concerning the Farmers' Creditors Arrangement Act, by G. W. Forbes, K. C.; Legal Aid in the United States, by Alan O. Gibbons; Marginal Notes, by Charles Morse, K. C.

University of Chicago Law Review, December (Chicago, Ill.)—Bankruptcy and Reorganization: A Survey of Changes, Edward H. Levi and James Wm. Moore; The Background of the Revenue Act of 1937, Randolph E. Paul.

University of Cincinnati Law Review, November (Cincinnati, Ohio)—Questions Raised by the Report of the Advisory Committee on Rules of Civil Procedure for the District Courts of the United States, Gustavus Ohlinger; Government Commercial Corporations, Harvey Pinney.

Columbia Law Review, November (New York City)—The Law of the Dollar, Arthur Nussbaum; The New Frazier-Lemke Act: A Study, Z. N. Diamond and Alfred Letzler.

Columbia Law Review, December (New York City)—A Rationale of the Law of Homicide II, Jerome Michael and Herbert Wechsler; Irrevocable Credits in International Commerce: Their Legal Effects, Philip W. Thayer.

Cornell Law Quarterly, December (Ithaca, N. Y.)—Taxing and Spending: The Loaded Dice of a Federal Economy, Harold Gill Reuschlein and Albert B. Spector; A General View of the Income Tax, Irving Fisher; The Excise Tax as a Regulatory Device, Ray A. Brown; The Federal Corporate Surplus Tax, Randolph E. Paul; Taxation Under the Federal Social Security Act: Constitutional and Regulatory Aspects, Lester B. Orfield; Social Control Through Taxation of Estates and Trusts, Percy W. Phillips; Control of National Agricultural Production and Consumption Through Taxation, Elbert P. Tuttle; Conflicts Between Federal Regulation Through Taxation and the States, F. D. G. Ribble; State Jurisdiction to Tax Intangibles, Edward S. Stimson; The State Corporate Tax as a Means of Regulation, George Vaughan.

Journal of Criminal Law and Criminology including the *American Journal of Police Science,* November-December (Chicago, Ill.)—Dostoevsky's "Raskolnikov," Paul Chatham Squires; Research Bulletin, Thorsten Sellin and J. P. Shalloo; Third Degree Practices, Herman C. Beyle and Spencer Parratt; Noiseless Rackets, Daniel J. Gillin; Reformers Why Not?, John Landesco; Fingerprint Forgery," William W. Harper; Bombs and Explosions, C. W. Muehlberger.

The Georgetown Law Journal, November (Washington, D. C.)—Legal Maxims, and Their Use in Statutory Interpretations, Ward E. Lattin; Testamentary Construction: The Psychological Approach, Edmond N. Cahn; Legal Aid in Civil Cases, George Scott Stewart, Jr., and Robert D. Abrahams; The Law Revision Commission of the State of New York, John W. MacDonald.

George Washington Law Review, November (Harrisburg, Pa.)—Federal Regulation of Collective Bargaining, by Earl G. Latham; An Analysis of the Standard of Public Interest, Convenience and Necessity as Defined by the Federal Communications Commission in Radio Decisions, by Maurice M. Jansky. Constitutional Objections to the Appointment of a Member of a Legislature to Judicial Office.

Harvard Law Review, November (Cambridge, Mass.)—Constitutional Interpretation—The Experience of Canada, W. Ivor Jennings; Ascertainment of "Earnings or Profits" for the Purpose of Determining Taxability of Corporate Distributions, Randolph E. Paul; Separability and Separability Clauses in the Supreme Court, Robert L. Stern.

Harvard Law Review, December (Cambridge, Mass.)—Law Making by Private Groups, Louis L. Jaffe; Class Gifts to Others than to "Heirs" or "Next of Kin"—Increase in the Class Membership, A. James Casner; Restatement of Restitution, A Review, Lord Wright.

Illinois Law Review, November (Chicago, Ill.)—The Mechanism of Fact-Discovery: A Study in Comparative Civil Procedure, Robert Wyness Millar; Why Pay Alimony? John S. Bradway; Federal Class Actions, James Wm. Moore and Marcus Cohn.

Iowa Law Review, November (Iowa City, Ia.)—Alienability and Perpetuities II, by Percy Bordwell; Definitive Standards in Federal Obscenity Legislation, by Charles B. Nutting; The Common Law of Legislation, by Frank R. Horack.

Kentucky Law Journal, November (Lexington, Ky.)—The Corporate Trustee Problem, Albert R. Jones; Statutes of Limitation and the Ex Post Facto Clauses, Forrest R. Black; Homicide in Resisting Arrest, A. W. G. Kean.

Law and Contemporary Problems, October (Durham, N. C.)—Farm Tenancy Distribution and Trends in the United States, Howard A. Turner; The Bankhead-Jones Farm Tenant Act, James G. Maddox; Settlement and Unsettlement in the Resettlement Administration Program, Clarence A. Wiley; The Development of the Rural Rehabilitation Loan Program, Monroe Oppenheimer; Governmental Farm Credit and Tenancy, William G. Murray; Regulations of Farm Landlord Tenant Relationships, Albert H. Cotton; A Note on the Legal Status of Share-Tenants and Share-Croppers in the South, A. B. Book; Taxation in Aid of Farm Security, Russell J. Hinckley and John J. Haggerty; The Status of Agricultural Labor, William T. Ham.

Law Quarterly Review, July (Toronto, Canada)—Savigny and the Hostorical School of Law, Hermann Kantorowicz; Fraudulent Representation, Patrick Devlin; The History of the Criminal Liability of Children, A. W. G. Kean; The Law of Property Act, s. 131: Shelley's Case—Limitation to 'A and His Heirs,' F. E. Farrar; Manslaughter and Dangerous Driving, Patrick Dean; Trial by Jury in Modern Continental Criminal Law, Hermann Mannheim.

Marquette Law Review, December (Milwaukee, Wisc.)—Comments on the 1936 Surtax on Undistributed Corporate Earnings, Herman M. Knoeller; An Assignment of Accounts Receivable as a Security Device, Vernon X. Miller; The Administration of Justice as Affected by Insecurity of Tenure of Judicial and Administrative Officers, Charles A. Riedl.

Michigan Law Review, December (Ann Arbor, Mich.)—The Power to Carry on the Business of a Decedent, Harry Adelman; The Theory and Practice of Pre-Trial Procedure, Edson R. Sunderland; Damage as Requisite to Rescission for Misrepresentation, II, Glenn A. McCleary.

Minnesota Law Review, December (Minneapolis, Minn.)—The Wagner Labor Act Cases, by Jacob Geffs and William M. Hipburn; Class Suits and the Federal Rules, by Hiram H. Lesar; Nebraska's New Legislature, by Lane W. Lancaster.

Missouri Law Review, November (Columbia, Mo.)—The Work of the Missouri Supreme Court for 1936: Administrative Law, by H. L. Lisle; Appellate Procedure, by Thomas E. Atkinson; Banking and Negotiable Instruments, by Lawrence R. Brown; Constitutional Law, by Solbert M. Wasserstrom; Criminal Law, by Franklin E. Reagan; Evidence, by William H. Becker, Jr.; Public Utilities, by Frank E. Atwood; Taxation, by J. W. McAffee; Torts, by Glenn McCleary; Trusts, by W. L. Nelson, Jr.; Wills and Administration, by Thomas E. Atkinson; Workmen's Compensation, by James A. Potter.

Nebraska Law Bulletin, November (Lincoln, Neb.)—Bar Integration Comes to Nebraska, Henry H. Foster and John I. Munson; The Nebraska Unemployment Compensation Law, Lester B. Orfield; The Extent of Federal Jurisdiction Over Wild Life, Matthias N. Orfield; Reforming the Supreme Court, Edward F. Carter; The Challenge to Constitutional Government, Robert W. DeVoe.

North Carolina Law Review, December (Chapel Hill, N. C.)—Shaping Judicial Review of Administrative Tribunals, Ralph M. Hoyt; Why a "Burden of Going Forward"? D. W. Markham.

FRANK BILLINGS KELLOGG, 1856-1937

(The Editor asked Mr. Silas H. Strawn to write the following memorial. Mr. Strawn was an intimate friend of Mr. Kellogg for more than thirty years.)

FRANK BILLINGS KELLOGG was born at Potsdam, New York, December 22, 1856, and died at his home in St. Paul, Minnesota, December 21, 1937, the evening before his 81st birthday.

For more than half a century as a leader of the Bar, President of the American Bar Association, United States Senator, Ambassador to the Court of St. James, Secretary of State, author of the Kellogg-Briand Peace Pact, Judge of the Permanent Court of International Justice and a member of several Diplomatic Commissions, he was a prominent actor in making the history of his time.

His unusual intelligence, tireless industry, insatiable ambition and splendid courage, first were manifested when, at the age of 9, in 1865, he traveled with his family sometimes by wagon, sometimes by water, sometimes by rail and sometimes on foot from Potsdam, New York, to that far-off frontier farm near Elgin in Olmstead County, Minnesota.

He experienced all of the hardships and deprivations of a poor farmer's son in those pioneer surroundings. His educational opportunities were very limited, but he availed himself of such as there were and supplemented what he learned in school by assiduous reading and study, which resulted in his ultimately being recognized as a man of liberal education and versatile attainments.

While he frequently referred to his lack of what he called "a proper education," he differed from some self-made men in that he did not worship his maker, and never depreciated college and law school training. Evidences of his life study and research are his splendid private and professional libraries.

He was given honorary degrees by fifteen universities and colleges, including McGill at Montreal and Oxford in England. He was an Honorary Bencher of the Middle Temple in London, was decorated with the Grand Cross Legion of Honor in France, awarded the Nobel Peace Prize in 1929, made a member of the Order of Olive Branch in Argentina in 1930, given the Gold Medal of the National Institute of Social Science, and was the recipient of the Cardinal Newman Award of the Newman Foundation of the University of Illinois. His latest decoration was that of the White Grand Cordon of the Order of Jade, China, in 1936.

For several years he made liberal contributions to Carleton College, the largest of which was a half million dollars.

He was admitted to the Bar of Minnesota at the age of 21 and practiced in his home county with increasing success until, having demonstrated unusual ability in important litigation, at the age of 30, in 1887, he was invited to become a member of a leading St. Paul law firm, Davis, Kellogg and Severance. He had come a long way over rough going.

Senator Davis, the senior member of the firm, had been elected to the United States Senate in 1886, thus the responsibility of carrying on and building up a rapidly developing law practice was that of Mr. Kellogg and Mr. Severance. Among their early clients were the Duluth and Iron Range Railroad Corporation and the Minnesota Iron Company. Mr. Kellogg's connection with the iron and steel industry continued throughout his career, except when he was in public office. As a lawyer he frequently appeared for the United States Steel Corporation and its subsidiaries.

Shortly after Theodore Roosevelt became President he announced a program "to subordinate big corporations to the public welfare and shackle cunning and fraud exactly as centuries before government had interfered to shackle the physical force which does wrong by violence."

Although Mr. Kellogg was counsel for vast corporate interests, he was drafted by President Roosevelt to prosecute some of the alleged violators of the Sherman Act. The first case was against the General Paper Company, which resulted in victory for the government. Next came the Union Pacific case, conducted for the government by Messrs. Kellogg and Severance, with their associate counsel. The trial court beat them but the Supreme Court held that the control exercised by the Union Pacific over the Southern Pacific was illegal. Then followed the Standard Oil case, in which Mr. Kellogg was associated with Mr. C. B. Morrison, former United States District Attorney at Chicago, for the government. This case resulted in another victory. After that Mr. Kellogg was called the "Trust Buster."

His underlying philosophy was expressed in an article in the *Review of Reviews* for June, 1912, from which I quote:

> "In my opinion, it is not and should not be the desire of the American people to destroy any industry, but to control it; not to destroy capital, but to regulate it, for large aggregations of capital are necessary to many branches of business. But wealth is one of the greatest powers known in the world. It should be controlled so that it will not be used to the injury of the people. The highest development of civilization will be attained by keeping open to individual enterprse the great avenues of commerce and industry, so that every man, with reasonable capital, ability and industry, may safely embark itf some branches of industry with the hope of being something more than the employee of a corporation."

At the annual meeting of the American Bar Association in Milwaukee in 1912, Mr. Kellogg delivered a memorable address on "The New Nationalism." At that meeting he was elected President of the Association for the ensuing year.

The 1913 meeting of the Association was held at Montreal and the annual address was delivered by the Right Honorable R. B. Haldane, the Lord High Chancellor of England. To obtain Lord Haldane, Mr. Kellogg made a special trip to England and was able to persuade him to accept the invitation because of the assistance of the Attorney General of England (later Lord Reading), Prime Minister Asquith, and by a personal interview with the King. The Montreal meeting was an outstanding event in the history of the American Bar Association.

The next distinguished honor that came to Mr. Kellogg was his election to the United States Senate from Minnesota in 1916. He served his full term of

six years. Space will not permit me to detail his contributions to the deliberations of that body.

He was defeated for re-election by Henrik Shipstead in 1922.

At the expiration of his term in the Senate, Mr. Kellogg arranged to return to the practice of law at St. Paul. As he was about to leave Washington President Harding appointed him a delegate to the Pan-American Conference at Santiago, Chile. He accepted the appointment and, with Mrs. Kellogg, attended the Conference. While the success of that Conference is debatable, Mr. Kellogg learned much of the conditions of the South American people and their politics, which served him well in his future position as Secretary of State.

Returning to St. Paul, he was not permitted to remain long. President Coolidge appointed him Ambassador to Great Britain and he and Mrs. Kellogg landed in London on December 30, 1923. During his two years at that Embassy he discharged the arduous duties of our most important and exacting post with marked ability. Leasing Crewe House as a domicile, he and Mrs. Kellogg entertained frequently and splendidly.

Mrs. Kellogg is a lady of unusual intelligence, great charm and rare tact. With her long and varied experience in social life as the wife of a leading lawyer and a United States Senator in Washington, she was exceptionally well-qualified for her exacting responsibilities as hostess. Two thousand American lawyers who were received at Crewe House during the visit of the American Bar Association to London in 1924, are still remarking on the magnificent reception given by the Kelloggs.

During Mr. Kellogg's time at the London Embassy he was not only the principal liaison between our government and Great Britain but was called upon to sit in many conferences between us and other European countries. Most notable was the conference resulting in the evolution of the Dawes Plan.

On the resignation of Judge Hughes, President Coolidge appointed Mr. Kellogg Secretary of State. Among the numerous problems which he inherited was the long standing dispute between Chile and Peru. After four years of negotiation, the parties adopted the suggestions of the United States and settled the controversy.

Then came the Peking Conference, being an effort to implement the Treaty worked out at the Washington Conference on Limitation of Armaments in 1921-22. This Conference involved two problems, the settlement of the Chinese Customs tariff and the abolition of Extraterritorial Jurisdiction in China. The delegates, after ten months of earnest endeavor, were unable to come to an understanding with the Chinese respecting her customs tariff because of the departure of the Chinese delegates from the Conference, due to a change in the war lords and the resultant disintegration of the Chinese Government. The Extraterritoriality Commission made a report, signed by all of the Powers including the Chinese, that China was not ready for the abolition of Extraterritoriality.

Following the Conference and on January 27, 1927, Mr. Kellogg issued a statement to the effect that the United States was prepared to enter into negotiations with any government of China, not only for the putting into force of the surtaxes of the Washington Treaty but entirely releasing tariff control and restoring complete tariff autonomy to China. And, further, that the United States was prepared to put in force the recommendations of the Extraterritoriality Commission and to release the Extraterritorial rights as soon as China was prepared to provide protection by law and through her courts to American citizens, their rights and property.

HON. FRANK B. KELLOGG

Perhaps the most notable achievement of Mr. Kellogg as Secretary of State was the working out of the so-called Pact of Paris and obtaining the signatures of the several Powers to the Pact, which contemplated the outlawing of war. Public announcement was made in January, 1929, that the Pact had been accepted by sixty-two states.

In a broadcast delivered by Mr. Kellogg in St. Paul in 1935, respecting the Pact, he said:

"The United States, in common with other countries, should designate Italy as the aggressor in the present Italo-Ethiopian conflict and denounce the former country's violation of international treaty obligations. The American government should take no steps to interfere with or nullify measures other nations are taking to stop the war. . . . It is important that the United States try to keep out of war, but it is even more important that this country help in every practicable way to prevent war and co-operate with other nations to this end."

The last public service performed by Mr. Kellogg was as a member of the Permanent Court of International Justice, to which he was appointed in 1930 and served, with distinction, until his resignation in 1935, when he returned to St. Paul to resume his law practice.

I submit that the career of Frank Kellogg was one of remarkable achievement. His outstanding characteristic was a determination to succeed in everything he undertook. His record should be an inspiration to the youth of America.

AMERICAN BAR ASSOCIATION JOVRNAL

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Subscription price to individuals, not members of the Association, $3 a year. To those who are members of the Association the price is $1.50 and is included in their annual dues. Price per copy, 25 cents.

JOSEPH R. TAYLOR
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Chicago, Illinois

FRANK BILLINGS KELLOGG

A great lawyer and a great American passed with the death of Hon. Frank B. Kellogg, a former President of the Association. We print a tribute to him from Mr. Silas H. Strawn, a friend of many years, in another part of this issue. It will be found on page 40.

THE OPINION OF LAWYERS KNOWS NO SECTIONAL LINES

Whenever the lawyers of the United States have an opportunity to vote individually their views, at home in their respective States, one of the results is a refutation of the claim that there are fundamental differences of opinion among the lawyers of the different parts of the country, upon questions of constitutional changes and legislation with economic and social aspects.

In the Child Labor referendum during November, the members of the Association in every State voted against the ratification of the Amendment submitted to the States in 1924. It had been widely asserted that the Association membership was not in accord with the opposition voted at annual meetings.

Likewise, the members of the Association in every State expressed preference for the Vandenberg Amendment rather than the 1924 Amendment. Upon less fundamental issues, the lawyers in the different States divided sharply, as lawyers will on such matters; but the States of no one section of the country were in any instance alone, in the stand taken for or against a particular measure.

In the referenda last March and April upon the Court issues, it appeared that lawyer non-members of the Association thought and voted substantially the same as did members of the Association, throughout the country, upon questions affecting the Courts and the administration of justice.

MR. NEWTON D. BAKER

Christmas Day brought a great loss to American lawyers and to their country, in the passing of Mr. Baker, member of the Board of Governors of the Association, a recognized leader and spokesman of the profession, and a valiant and tireless worker for the world's peace and for the solution of the problems of his time. In many ways, Mr. Baker was of the finest type of American lawyer—a "liberal" in the truest sense, a "conservative" in the soundest sense. His thoroughness and scholarship in the law and his moving eloquence as an advocate won him recognition as one of the most sagacious and effective of present-day lawyers. For many years, he had been able to choose, from among the many retainers offered him, those which seemed most to need and deserve his great talents for clear and constructive statement.

Above all, he was a citizen possessed of convictions deeply but tolerantly held. They dominated and guided his life, and it made little or no difference to him if at a particular time his views placed him in the outposts of advanced thinking or classed him as an opponent of ephemeral panaceas which he believed would be soon discarded. Others might shift and change their philosophy of human welfare; his was a consistent and continuing view which required no make-shifts and permitted no compromises.

From young manhood, he worked unceasingly for the peace of the world, for better understanding and greater tolerance among men of all races and faiths, for a genuine broadening of opportunity for those who had been underprivileged or caught in some eddy, and for the breaking down of arbitrary power in government and in private hands. The passion of his life was that men should be truly free—politically, economically, intellectually, spiritually free—and he spent and gave his life in warfare against everything which would shackle or regiment human beings anywhere in the world. This animating motive he carried fearlessly to all its conclusions, even when it called on him to part company with men who once had labored for the same cause.

Probably nothing better could be said of the American Bar Association than that Mr. Baker believed in it, gave freely of his time

and invaluable counsel to aid its leadership, and was willing to make the Association one of the relatively few organizations in which he would hold office and to which he would devote his diligent endeavors. His staunch adherence to the Association was an acid test of its worth, because he saw in it the practicable means of advancing true interests of the public, along with the best interests of the profession of which he was examplar.

He will be greatly missed from the councils and the work of the Association. Several years ago, a friend went to him and said: "Mr. Baker, a great many lawyers would like to see you elected President of the American Bar Association. You will be elected if you will let your name go in as a candidate." Mr. Baker at once replied: "I would be glad and honored to be President of the American Bar Association." That seemed to settle it, but Mr. Baker went on to say: "Under no circumstances would I let my name be used until I had become thoroughly familiar with the work of the Association, through serving on some of its Committees, particularly its Executive Committee" (now the Board of Governors). At the Boston meeting in 1936, he was elected as the member of the Board of Governors from the Fourth Circuit, and he has taken an active part in the work of the Board. Since January of 1936, he has served as Chairman of the Joint Committee on Cooperation Between the Press, Radio, and Bar, and rendered outstanding service in that capacity. He had been greatly interested in bringing the Association to Cleveland for its annual meeting in 1938, and had recently accepted the chairmanship of the general committee in charge of the arrangements to be made by the Bar of Cleveland and of Ohio. In all probability, had health and life been permitted him, he would soon have been chosen by general acclaim for the highest honor within the gift of the Association. The death of such a spokesman of American institutions is indeed a great loss.

JOINT DUES WITH THE AMERICAN BAR ASSOCIATION

From the long-range view of the potential future of the organized Bar in the United States, one of the most significant incidents of the Kansas City meeting may prove to be the appearance, before the Board of Governors, of the President and Secretary of the North Dakota State Bar Association, with the State Delegate from that State. They came to invoke the provisions of Article II, Section 5, of the present By-laws of the American Bar Association, pursuant to which a State or local Bar Association may apply for the establishment of joint dues between it and the American Bar Association, on a basis enabling all of the members of the State or local Association to become members of the National organization of the Bar upon proposal and election in the usual way. In that event the Board of Governors is authorized to make an arrangement, subject to the approval of the House of Delegates, for such a system of joint dues, based on inclusive membership in the American Bar Association. The joint dues are then collected under such an arrangement as is satisfactory to both Associations.

North Dakota was the first of the States to adopt the integrated form of Bar organizations. The State has not ranked high in the percentage of its lawyers who have joined the American Bar Association. The leaders and members of its State Bar have perceived the advantages which would be gained mutually if all of its members were also members of the American Bar Association, received the JOURNAL and the various reports, voted in the referenda and elections, and generally were abreast of what is taking place in the organized Bar of the Nation.

Whether or not it will be practicable to work out at this time the particular arrangement desired by the State Bar of North Dakota is receiving the consideration of the Board of Governors. Some local Bar Associations had already been discussing an application under the same provision of the By-laws. The mutual advantages of such inclusive memberships in the American Bar Association are likely to commend such an arrangement to more general consideration.

THE YOUNGER LAWYERS

In a recent article in the *New York Times Magazine*, the dean of the Harvard Law School stated his view that the present-day law school is confronted by a challenge thrown up by the claims of a civilization which has become complex and by the new legal machinery which has been and is being erected to protect and satisfy those claims. The distinctive opportunity of the younger lawyers of today and tomorrow, as well as a new duty of the law schools is seen by Dean Landis to spring from this "challenge", which seems to him to lie "upon the frontiers of today's knowledge, the frontiers of social and economic change where the patterns of the legal order are still confused and where the role of law itself is still in doubt."

The traditions of legal education seem to him to call for "lawyers conscious of their role,

not as craftsmen, but as mediators of human affairs, eager to understand the new claims, anxious to weigh their merit in the light of cross claims to which the new claims give rise, and fearful not of change, but of the want of understanding." Dean Landis thinks that the pioneering in emphasis upon the public responsibilities of the legal profession and upon the changing character of the legal scene should lead to no sacrifice or impairment of rigorous technical schooling and preparation. "Training in the law school must be broad," he says. "We must imbue it with a sense of public responsibility; but in so doing we cannot relax the emphasis on technical skill. In a sense the possibilities of public service are not teachable. Training for it is not a matter of specific courses or doctrines. All you can do is to give a young lawyer competence in the handling of problems. You can't dictate the results. The main thing is to create an atmosphere in which men can do the work that interests them and to hope that in that atmosphere the right attitude toward public service can be developed. The graduates with technical skill are those who are likely to be leaders in other qualities."

Dean Landis makes no suggestion that the new conditions require candidates for the Bar to abandon the cultural subjects—art, music, literature, the classics—or to supplement their legal training with any particular specializations in courses outside the domain of law. "After all," he says, "the best lawyer probably, is the most civilized person."

Having served with distinction on two great Federal commissions and having been the chairman of one, Dean Landis points out that the great and multiplying opportunities for young men coming to the Bar are in the field of administrative law, in which are dealt with the claims of people in general to be protected administratively from the aggressions of particular corporations and individuals. As typical of these new demands, he cites: The claim of the public to reasonable transportation rates; the claim for protection against fraud in the securities markets; the claim for the safety of bank deposits; the claim of smaller business for protection against money rates fixed by big financial interests; the claim of the laborer for protection against discrimination in his job due to his membership in a union. The widening number and activities of the administrative boards and commissions will, he thinks, call for a numerous body of trained lawyers to enter the government service. The "corporation lawyer", the "financial lawyer", the "labor lawyer" will all be called upon to work with the administrative agencies which supervise the activities of their clients—railroads, banks, utilities, security exchanges, shipping and communications companies, labor unions, and many other enterprises. Even in their capacity as personal counsel to individuals—investors, bankers, brokers, employees and customers of the corporations and financial institutions, which the new administrative law seeks to regulate—the lawyers will have to deal with this new phase of the law in which appear to be combined the functions of prosecutor, judge and legislator, with specialization as an essential characteristic, as contrasted with impartial and law-governed courts of general jurisdiction. For all of these new roles, Dean Landis thinks that the law schools must plan to fit the neophytes, so that they shall come from the schools ready and eager to enter upon these new responsibilities. "I want to see the C I O as well represented by counsel as the New York Stock Exchange", Dean Landis concludes.

Without discussing here the merits or the consequences of such a program for a particular law school, it may appropriately be pointed out that opportunity already exists whereby young lawyers, from all law schools may take post-graduate courses in administrative law and thus obtain experience and outlook, and at the same time render disinterested public service. Membership in the Junior Bar Conference of the American Bar Association offers such an opportunity to lawyers under thirty-six years of age. As to each of the fields enumerated by Dean Landis as new, and as to about a dozen others of public importance, Standing or Special Committees of the Association are at work; and on nearly all of these the younger lawyers are represented. The work of the American Citizenship Committee has been taken over outright by the Junior Bar, as told by President Vanderbilt in THE JOURNAL for November. About 175 members of the Junior Bar are serving this year on Standing and Special Committees of the Association, and at least as many more are on the Committees of the various Sections. This is in addition to the work of the Junior Bar Conference itself, whose committees deal with subjects particularly affecting the younger lawyers.

All this means that in practically every phase of the year-round activity of the Association, the members of the Junior Bar have a place as of right at the council table, and are making their contribution to the expert study of matters within the province of the Association. At the same time, they are gaining a practical experience and training that will certainly be of help to them, in public office or in work for private clients.

LAWYERS AND LABOR PROBLEMS

It has recently been reported said that the American Bar Association does not have "any arrangement for giving attention to labor law", and that the Association makes no contribution to the consideration of the subject by the Congress, the States and the public.

The fact is that the American Bar Association, at its Boston meeting in August of 1936, created a Standing Committee on Labor, Employment and Social Security. The Chairman of this Committee last year and this year has been Mr. John Lord O'Brian, of Buffalo, special counsel for the Government of the United States in the litigation as to the Tennessee Valley Authority. Among the four other members of the Committee has been and is Dean Lloyd K. Garrison of the University of Wisconsin Law School, first Chairman of the National Labor Board.

The Kansas City meeting of the House of Delegates received the preliminary report of the new Standing Committee of the Association, and voted to the Committee the following instructions:

"1. That the Committee be empowered to make a continuing study of the Social Security Act and of the National Labor Relations Act and of related statutes and their administration, for the purpose of formulating and presenting to the Association from time to time detailed recommendations.

"2. That the Committee, informally and without commitment on the part of the Association, establish contact with the administrative officials and official committees concerned with the administration or amendment of the statutes, for the purpose of keeping the Association advised of the substance of proposed amendments or regulations, with the approval of the Board of Governors first obtained as to any specific action, and of collaborating informally to aid in the improvement of the statutes."

Along with other phases of the laws affecting human welfare and the rights of persons and property, the American Bar Association is giving active attention to the new laws affecting labor, employment and social security. The representative membership of the Committee gives assurance of thorough and remedial consideration and the development of significant recommendations.

ANNOUNCEMENT OF 1938 ESSAY CONTEST CONDUCTED BY AMERICAN BAR ASSOCIATION PURSUANT TO TERMS OF BEQUEST OF JUDGE ERSKINE M. ROSS, DECEASED

INFORMATION FOR CONTESTANTS

Subject to be discussed:

"The Extent to Which Fact-Finding Boards Should be Bound by Rules of Evidence."

Time when essay must be submitted:

On or before March 1, 1938.

Amount of Prize:

Three Thousand Dollars.

Eligibility:

Contest will be open to all members of the Association in good standing, except previous winners, officers, members of the Board of Governors, and employees of the Association.

No essay entered will be accepted unless written especially for this contest and not previously published. Each entryman will be required to assign to the Association all right, title and interest in the essay submitted. Any essay not desired for further use by the Association will, upon request of its author, be returned and the interest of the Association therein waived.

An essay shall be restricted to five thousand words, including quoted matter and citations in the text. Footnotes may be used and will not be counted as a part of the essay, but excessive documentation in footnotes may be penalized by the judges of the contest.

Each contestant must agree to abide by the decision of the Board of Governors in the selection of the winner and on any question raised.

Procedure:

Anyone wishing to enter the contest shall communicate promptly with Olive G. Ricker, Executive Secretary, American Bar Association, 1140 North Dearborn Street, Chicago, Illinois, who will furnish:

(a) entry number in quadruplicate, in a container sealed prior to receipt of any application, so that the number therein may be known only to the recipient;

(b) large envelope, addressed, for mailing essay;

(c) small envelope, addressed, for mailing one of the entry numbers together with printed form to be filled in by the contestant to show name and address; which will thereafter not be opened until the winning essay has been selected and its identifying number announced.

Essay is to be submitted in triplicate, typewritten, double spaced (footnotes, however, may be single spaced), on one side of plain white paper, letter size (8½x11), and mailed as first class matter, without folding, in the envelope furnished for that purpose, on or before March 1, 1938. Total number of words of the text on each page shall be typed on bottom of each page of at least one copy. For identification, one of the entry numbers furnished for that purpose shall be affixed to each of the three copies of the essay. Any other identifying mark on the essay or on the envelope containing the same, or on the envelope containing the fourth number and the name and address of the contestant, will disqualify the entry.

The fourth entry number shall be attached to a printed form on which the entryman shall type his full name and address, sign the agreement printed thereon, and then seal for mailing in the envelope furnished for that purpose. That envelope, when prepared for mailing, will be held by the entryman until March 2, 1938, and then mailed. It is not to be mailed in or with the envelope which contains the copies of the essay, which must be postmarked not later than March 1, 1938.

No additional information will be given by the Executive Secretary. Any questions raised will be submitted to the Board of Governors for consideration.

REVIEW OF RECENT SUPREME COURT DECISIONS

Taxable Status of Stock Dividend on Common Stock Payable in Preferred — Where Supreme Court Is not open for Review of Erroneous Decision of Board of Tax Appeals — Jurisdiction to Determine State's Title to Property Claimed by Virtue of Penal Forfeiture but Held by Trustee in Proceedings under 77B—Federal Interpleader Act—Anti-Trust Act of Puerto Rico Held Valid—Liability of Stockholders for Contribution for Tax Assessed after Liquidation of Corporation—Failure to Exhaust Administrative Remedy Provided by State Law—Tax on Receipts under Government Contracts — Territorial Jurisdiction of States and United States—Other Cases Reviewed or Summarized.

By Edgar B. Tolman*

Income Tax—Stock Dividends—Sale of Stock Received as Dividend

A stock dividend on common stock, payable in preferred stock, is not subject to an income tax under the Revenue Act of 1928.

Upon the sale of the stock thus received as a dividend the proceeds are subject to tax to the extent of gain realized over the cost of the stock.

Helvering v. *Gowran*, 82 Adv. Op. 180; 58 Sup. Ct. Rep. 154.

This case involved questions under the income tax law as to the taxable status of a preferred stock dividend and the proceeds from its sale.

The facts were that on June 29, 1929, a corporation had preferred stock outstanding at $100 per share par value and common stock without par value. On that day, a dividend of $14 a share on the common stock was declared from surplus earnings, payable in preferred stock at par value on July 1st of that year. The respondent as a holder of common received 533 and a fraction shares of the preferred as a dividend. About October 1st of the same year the company acquired respondent's preferred stock, paying $53,371.50, at $100 a share. In his income tax return for the year, respondent did not treat this payment as taxable income, but included $27,262.72 as capital net gain on the shares received and sold. The Commissioner determined that the full amount was taxable income under the Revenue Act of 1928, § 115 (g), as a stock dividend redeemed. He assessed a deficiency of $5,831.67. The taxpayer appealed to the Board of Tax Appeals which ruled that there had been no cancellation or redemption of the preferred stock so as to make it taxable under § 115 (g), and that the transaction was a sale to the company. The Commissioner sought a reconsideration of the case and then contended that the dividend was taxable because it resulted in a change in the respondent's proportionate interest in the company. This contention the Board upheld and affirmed the deficiency. On an appeal by the respondent to the Circuit Court of Appeals, the Commissioner urged that the stock dividend was taxable, and for the first time contended that, even if not taxable, the deficiency should be affirmed, because within the year the stock had been sold at its par value, and as its cost was zero the entire proceeds constituted income. The Court held the dividend not taxable because of the provision of § 115 (f) that "A stock dividend shall not be subject to tax." It held further, that the proceeds were not taxable as income for the reason that there was no profit on the sale in view of the agreement that the fair market value both when received and sold was $100 per share. On certiorari, the Supreme Court reversed the judgment, in an opinion by Mr. Justice Brandeis.

In this opinion the Court agreed that the stock dividend was not taxable as income, notwithstanding that Congress had constitutional power to impose an income tax on a dividend issued under the circumstances involved. Resting its conclusion on this point on the provisions of § 115 (f) that "A stock dividend shall not be subject to tax," the Court said:

"The prohibition is comprehensive. It is so clearly expressed as to leave no room for construction. It extends to all stock dividends. Such was the construction consistently given to it by the Treasury Department. The purpose of Congress when enacting § 115 (f) may have been merely to comply with the requirement of the Constitution as interpreted in *Eisner v. Macomber*, 252 U. S. 189; and the comprehensive language in § 115(f) may have been adopted in the erroneous belief that under the rule declared in that case no stock dividend could be taxed. But such facts would not justify the Court in departing from the unmistakable command embodied in the statute. Congress declared that the preferred stock should not be taxed as a dividend."

The Government contended further that if the dividend was not taxable the deficiency should be sustained as the gain from the sale within the year was taxable income, and that the entire proceeds must be deemed income, because the stock had cost the respondent nothing. This view the Circuit Court of Appeals rejected and relied on an analogy of the sale of a tax-free gift or bequest. The Supreme Court, however, found the cases not analogous and concluded that the proceeds were taxable.

Rejecting the analogy relied upon by the Circuit Court of Appeals, Mr. Justice Brandeis said:

"The cases are not analogous. Unlike earlier legislation, Section 113(a)(2) of the Revenue Act of 1928 prescribes specifically the basis for determining the gain on tax-free gifts and legacies. It provides that: 'If the prop-

*Assisted by James L. Homire and Leland Tolman.

erty was acquired by gift after December 31, 1920, the basis shall be the same as it would be in the hands of the donor or the last preceding owner by whom it was not acquired by gift.' And the basis for the computation on property transmitted at death is provided for in paragraph (5). But the method of computing the income from the sale of stock dividends constitutionally taxable is not specifically provided for. Furthermore, unlike Section 22(b)(3), excluding from gross income the value of gifts and legacies, Section 115(f) cannot, in view of its history, be taken as a declaration of Congressional intent that the value of all stock dividends shall be immune from tax not only when received but also when converted into money or other property. Gain on them is, therefore, to be computed as provided in §§ 111 and 113, by the 'excess of the amount realized' over 'the cost of such property' to the taxpayer. As the cost of the preferred stock to Gowran was zero, the whole of the proceeds is taxable."

The respondent urged also that the Government should not have been permitted by the Circuit Court of Appeals to present its "basis of zero" theory, because that raised an issue not present in proceedings before the Board. This contention the Supreme Court rejected, citing the familiar rule that a correct decision will not be reversed because based upon a wrong ground or reason. As to this, MR. JUSTICE BRANDEIS said:

"In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason. . . . This applies also to the review of decisions of the Board of Tax Appeals."

The judgment was reversed to give the taxpayer an opportunity to establish additional facts which might affect the result of the "basis of zero" theory rejected by the Court of Appeals but sustained by the Supreme Court, as appears from the following portion of the Court's opinion:

"If the Court of Appeals had accepted the theory, it would have been open to the taxpayer to urge, in view of the new issue presented that he should have the opportunity to establish before the Board additional facts which would affect the result. As we accept the new theory, leave is granted Gowran to apply to the lower court for that purpose."

The case was argued by Mr. Assistant Attorney General Jackson for the petitioner, and by Mr. John C. Altman and Mr. A. L. Nash for the respondent.

Taxation—Income Tax—Review of Decision of Board of Tax Appeals

Where the Commissioner has acquiesced in an erroneous ruling of the Board of Tax Appeals, that the proceeds from the sale of stock received as a dividend by the taxpayer are not taxable, and takes no appeal therefrom to the Circuit Court of Appeals, the ruling of the Board is not open for review in the Supreme Court.

Helvering v. Pfeiffer, 82 Adv. Op. 185; 58 Sup. Ct. Rep. 159.

This case also involved questions of income taxation of stock dividends.

The respondent, in 1931, as the holder of common stock in the William R. Warner Corporation, received as a dividend 6,291¼ shares of its preferred stock. She also received from the Corporation in that year $200,000 cash in exchange for 2,000 shares of the preferred stock which she received as a dividend in 1928. Her return for 1931 did not include either item as taxable income, because she deemed the preferred stock dividend exempt under § 115 (f), and considered the $200,000 cash as proceeds from the sale of a capital asset rather than taxable income. The tax return did include $180,000 of the cash as taxable gain on the sale and a tax of $22,512.50 was paid thereon. The Commissioner assessed a deficiency on account of each item. On the taxpayer's appeal to the Board of Tax Appeals, the latter affirmed the Commissioner's determination that the preferred stock was taxable income, but reversed his determination as to the proceeds from the sale of the 2,000 shares. The Commissioner acquiesced in this decision, but the tax payer sought further review in the Circuit Court of Appeals. The latter reversed the Board as to the stock dividend, holding it exempt under § 115(f), and affirmed as to the $200,000 cash. On the Commissioner's petition for certiorari, the judgment was affirmed, in an opinion by MR. JUSTICE BRANDEIS. The ruling in *Helvering v. Gowran* was held controlling as to the non-taxability of the stock dividend.

As to the status of the $200,000 cash payment, the Court concluded that it could not consider the Government's contention that it was a taxable gain because the Commissioner had failed to seek in the Circuit Court of Appeals a review of the Board's decision with respect to that question. The Court's decision of this point was stated as follows:

"We are not at liberty to entertain that contention. The Board of Tax Appeals decided that the $200,000 was not taxable income of 1931. As the Commissioner did not seek a review of that decision, which was adverse to him, the Circuit Court of Appeals properly refused to consider the contention . . . While a decision below may be sustained, without a cross-appeal, although it was rested upon a wrong ground, see *Helvering v. Gowran*, an appellee cannot without a cross-appeal attack a judgment entered below. . . The same rule applies to a decision of the Board of Tax Appeals."

The Court also denied the Commissioner's request that the case be remanded to the Board to determine the taxable status of the 2,000 shares issued in 1928, and said:

"The Commissioner requests that, if we hold that the Board erred in declaring that the 2,000 shares received in 1928 were then taxable and refuse to review its decision that the proceeds received in 1931 were not taxable, we should remand the case to the Board to determine whether redemption of the 2,000 shares was made at such time and in such manner as to be essentially equivalent to the distribution of a taxable dividend under § 115(g). The Commissioner acquiesced in the decision of the Board. No good reason is shown for disturbing it."

MR. JUSTICE STONE and MR. JUSTICE CARDOZO delivered a dissenting opinion in which they took the position that the case should have been remanded to the Board of Tax Appeals to review the deficiency, in conformity with the rule of tax liability established by the opinion of the Court, but in an amount not exceeding that which the Board had found.

The case was argued by Mr. Assistant Attorney General Jackson for the petitioner and by Mr. John C. Altman and Mr. A. L. Nash for the respondent.

Bankruptcy—Jurisdiction to Determine Title to Property Subject to Confiscation

In a reorganization proceeding, under § 77B of the Bankruptcy Act, a State is entitled to institute proceedings in a state court to determine its title to property, claimed

by it by virtue of penal forfeiture, because illegally produced or transported.

State of Texas et al. vs. Donoghue, 82 Adv. Op. 188; 58 Sup. Ct. Rep. 192.

In this case the Supreme Court considered a question as to the right of a State to institute proceedings in a state court for confiscation of oil, held by a trustee in reorganization proceedings under § 77B of the Bankruptcy Act.

Statutes of Texas and orders of its Railroad Commission purport to prorate the production of crude oil and to prohibit dealing in oil produced in excess of the amount prescribed, and to subject to confiscation oil produced or transported contrary to the statutes or orders of the commission. Confiscation is to be determined by proceedings brought in the state court, which may render judgment forfeiting oil to the State and authorizing its officers to seize and sell the condemned oil.

In the instant case proceedings were instituted by Texas in the state court to recover fines and penalties. The state court appointed receivers of the defendant's property who took possession of a large quantity of oil which the State claimed had become its property by reason of its unlawful production or transportation. Within four months after the commencement of the suit, the oil company commenced proceedings for its reorganization under the Bankruptcy Act. Its petition thereunder was approved and the respondent, as trustee, was directed to take possession of its property. The trustee took possession from the receivers, including the oil in question. Texas thereupon applied for permission to bring suit in a state court to obtain judgment for the confiscation of the oil. The federal court denied the petition sought and directed the trustee to keep the oil. On appeal the Circuit Court of Appeals sustained that ruling. On certiorari, however, the judgment was reversed in an opinion by MR. JUSTICE BUTLER, with two Justices dissenting.

In holding that the permission sought should have been granted, the Court emphasized that the State was seeking not to establish presently a right to forfeit the oil, but that the State's claim was that the oil had become its property when illegally produced or transported, and that possession of the oil by the State court was not essential to the latter's jurisdiction to determine the question whether the oil had been illegally produced or transported. In this connection, MR. JUSTICE BUTLER said:

"The State's right to bring the suit in the state court is the same as if on its voluntary petition the company had been adjudged bankrupt on the day its petition for reorganization was approved. § 77B(o). Forfeiture of unlawful oil under Texas law is a penalty imposed to vindicate the State's policy of conservation. . . The bankruptcy court exercises jurisdiction under sovereignty that is independent of and foreign to that of Texas. . . It is without power to enforce penalties imposed by the State for violation of its laws. . . The State's insistence is not that it is presently entitled to establish a right to forfeit the oil, but that the oil became its property when produced or transported contrary to law. It seeks not to forfeit but to enforce the forfeiture that resulted, as it maintains, immediately from unlawful production or transportation.

"Possession or control of the oil by the state court is not essential to its jurisdiction to entertain the suit proposed to be brought. Texas does not claim to be entitled to possession of the oil until final adjudication in the state court. Retention by the trustee is not inconsistent with the maintenance of that suit. He is entitled there to be heard in support of his claim to the oil. If when the debtor's petition was approved the oil did not belong to Texas, the State was not entitled to have it withheld from the trustee. But, if by reason of unlawful production or transportation, the oil had already by forfeiture become the property of the State, the trustee was not entitled to take or retain it. If in a suit brought by Texas in a state court it should be determined that title to the oil had vested in the State before approval of the debtor's petition, the bankruptcy court doubtless will recognize that title and direct the trustee to hand over the oil or account for it to the State."

In conclusion the Court observed that neither the filing of the petition for reorganization nor the state court's receivers' voluntary surrender of the oil to the bankruptcy trustee could deprive the State of an opportunity to establish in its own court its claim that through forfeiture it had become the owner of the oil, since that would be to take the State's property for the benefit of the company or its creditors.

MR. JUSTICE CARDOZO delivered a dissenting opinion in which MR. JUSTICE STONE joined.

In this opinion it was stressed that Texas was not the owner of the oil when it came into the possession of the bankruptcy court, for the reason that, under the established doctrine the property remains in the owner until it is actually seized by the government, and that the statutory procedure in Texas is consistent with the general rule that title is not transferred under a forfeiture, without the aid of a judgment. Such a judgment is to be *in rem*, implying a control of the *res*. In elaboration of his views, and denying that the bankruptcy court should enforce the penalty of forfeiture, MR. JUSTICE CARDOZO said:

"With the oil in the possession of the federal court of bankruptcy—a possession lawfully acquired—leave to sue in the state court for a decree of forfeiture and sale will be an idle and empty form, productive of nothing except delay and vain expense, unless upon the pronouncement of the decree it will be the duty of the court of bankruptcy to surrender the oil to the court of another jurisdiction, and this for the sole purpose of making a forfeiture effective. I deny that any such duty will exist. . . I find no intimation of its existence in any case till this one. Certainly there is none in the cases now cited in the opinion of the court. True indeed it is that if possession of the *res* were to be acquired by the Texas court at the time of the decree of forfeiture or even at the time of a sale pursuant thereto, a title obtained thereunder would be recognized as valid everywhere. . . This is far from saying that a court of another jurisdiction which already holds the *res* upon a trust for general creditors will give its possession up in aid of a forfeiture otherwise impossible. 'The courts of no country execute the penal laws of another.' . . . A federal court of bankruptcy is subject to no greater duty. The prevailing opinion commits us to a holding that property in one jurisdiction may be diverted from the use of creditors and made to feed a forfeiture in another jurisdiction, a forfeiture *brutum fulmen* unless thus aided from afar. If that is done, the efficacy of penal laws will have taken on a new extension. Without a transfer of possession the forfeiture is dead at birth. A court of bankruptcy will not stir a hand to make it viable."

The case was argued by Mr. William C. Davis and Mr. W. J. Holt for the Petitioners, and by Mr. William B. Harrell and Mr. Robert W. Kellough for the Respondent.

Procedure—Federal Interpleader Act

The Federal Interpleader Act provides no remedy, at the suit of the executor of a decedent's will, to determine the rival claims of two different states for death taxes, asserted to be due each state by reason of the decedent's

domicile therein at the time of his death. Such a proceeding is, in substance, a suit against the State, and is forbidden by the Eleventh Amendment.

Worcester County Trust Company vs. Riley et al., 82 Adv. Op. 192; 58 Sup. Ct. Rep. 185.

In this case the Supreme Court ruled that the Federal Interpleader Act, § 24 (26) of the Judicial Code, may not be availed of to determine the rival claims of two states, each asserting through its officials the right to recover death taxes, on the ground that the decedent was last domiciled within its boundaries.

The petitioner was the executor of the decedent's will, which has been probated in Massachusetts. Ancillary proceedings were had in California. The petitioner brought the instant suit in the Federal District Court for Massachusetts, joining officials of Massachusetts and California, charged with the duty of collecting death taxes in their respective states. The bill of complaint was based on the Interpleader Act, and sought the relief which it provides.

It was alleged that the decedent left bank deposits and other intangibles in California and Massachusetts, that the California tax officials have determined and assert that the decedent died domiciled in California, and that his estate is subject to California death taxes on all his intangibles; that they have threatened to collect a tax in excess of any which would be due if the decedent died domiciled in Massachusetts; that the Massachusetts officials assert a similar claim; that the decedent was domiciled in Massachusetts; and that his estate is subject to a tax there on all his intangibles; that it is legally impossible for the decedent to have been domiciled in both states when he died, or for his estate to be subject to taxation in both as asserted; and that the attempted collection of the tax is a threatened deprivation of property in violation of the due process and equal protection clauses. Proper relief was prayed for. The California officials appeared specially and moved to dismiss the complaint as, in substance, a suit against the State in violation of the Eleventh Amendment. The District Court overruled this motion and granted a temporary injunction. The Circuit Court of Appeals, however, reversed the ruling on the ground urged by the California authorities. On certiorari, this was affirmed by the Supreme Court, in an opinion by MR. JUSTICE STONE.

In deciding the question involved, the petitioner's contention was first elaborated. It did not deny that a suit nominally against individuals *may be*, in substance, a suit against the State, or that generally suits to restrain the action of state officials can consistently with the Eleventh Amendment be prosecuted only when the challenged action is without the authority of the state law, or contravenes the statutes or Constitution of the United States. But the petitioner's contention was that here the contemplated action threatens a violation of the Constitution for which state law can afford no sanction; that the officers of each state may succeed in establishing by judicial determination that the decedent was domiciled in each state although he could not legally be so domiciled; that the petitioner was thus exposed to the danger of double taxation contrary to the Constitution; and that, since the officials threatened acts whose consequence may be unconstitutional taxation unauthorized by any valid state enactment, the suit brought to restrain the action does not run against the State.

But the petitioner's position was rejected by the Court as untenable. The petitioner's argument was characterized as involving confusion of a conflict of decisions of the courts of two different states with other types of action by state officials, which, because beyond their lawful authority, are subject to federal judicial power notwithstanding the Eleventh Amendment. The distinction between the possibility of conflicting decisions and unauthorized official action was stressed in the following portion of the opinion:

"But this argument confuses the possibility of conflict of decisions of the courts of the two states, which the Constitution does not forestall, with other types of action by state officers which, because it passes beyond the limits of a lawful authority, is within the reach of the federal judicial power notwithstanding the Eleventh Amendment. This Court has held that state statutes, construed to impose death taxes upon the intangibles of decedents domiciled elsewhere, infringe the Fourteenth Amendment, and it has accordingly reversed judgments of state courts enforcing such liability. . . But petitioner does not assert that there are such statutes in California or Massachusetts, or that the courts in those states have ever held or threaten to hold that their laws taxing inheritances apply to intangibles of those domiciled in other states."

The Court pointed out further that the petitioner's real concern was with the possibility of a decision in California at variance with the decision in Massachusetts. But the Constitution was found to provide no constitutional guarantee that the decisions of the state courts shall be consistent. Explaining this aspect of the Court's decision, MR. JUSTICE STONE said:

"Petitioner does not contend that respondents, the California officers, propose to do more than invoke the action of its courts to assess a lawful tax and to seek there a judicial determination that decedent was domiciled in California as the basis of its power to impose the tax. Nor is it denied that in so doing they are acting in the performance of official duty imposed upon them by state statutes, which conform to all constitutional requirements. Petitioner's real concern is that the judgment of the California court, if it should decide that decedent was domiciled there, may be erroneous or may conflict with that of the Massachusetts courts. But conflicting decisions upon the same issue of fact do not necessarily connote erroneous judicial action. Differences in proof and the latitude necessarily allowed to the trier of fact in each case to weigh and draw inferences from evidence and to pass upon the credibility of witnesses, might lead an appellate court to conclude that in none is the judgment erroneous. In any case the Constitution of the United States does not guarantee that the decision of state courts shall be free from error . . . or require that pronouncements shall be consistent. . . Neither the Fourteenth Amendment nor the full faith and credit clause requires uniformity in the decisions of the courts of different states as to the place of domicil, where the exertion of state power is dependent upon domicil within its boundaries. . . Hence it cannot be said that the threatened action of respondents involves any breach of state law or of the laws or Constitution of the United States. Since the proposed action is the performance of a duty imposed by the statute of the state upon state officials through whom alone the state can act, restraint of their action, which the bill of complaint prays, is restraint of state action, and the suit is in substance one against the state which the Eleventh Amendment forbids. We do not pass on the construction of the Interpleader Act or its applicability in other respects."

The case was argued by Mr. Merrill S. June for the petitioner, and by Mr. James J. Ronan for Long, Commissioner of Corporations and Taxation of Massachusetts, Intervener, by Special Leave of Court and by Mr. George S. Fuller for the respondent.

Monopolies—Conspiracy in Restraint of Trade—The Puerto Rico Act—Relation to Sherman and Clayton Acts

The anti-trust act of Puerto Rico is valid and enforceable in its local courts, notwithstanding that the federal anti-trust acts are also valid and operative in Puerto Rico.

Puerto Rico vs. The Shell Co. (P. R.) Limited, et al, 82 Adv. Op. 170; 58 Sup. Ct. Rep. 167.

This case dealt with the validity of the local anti-trust act of Puerto Rico in its relation to the Sherman Anti-Trust Act as supplemented by the Clayton Act of 1914.

By an information filed in a local court of Puerto Rico the respondents were charged with a conspiracy in restraint of trade in violation of the local anti-trust act. On demurrers to the information, the local district court sustained the demurrers and held that the federal acts covered the entire field embraced in the local act, and that the latter was consequently void. The Supreme Court of Puerto Rico accepted that view, and on an appeal to the Circuit Court of Appeals for the First Circuit, its judgment was affirmed. On certiorari, the judgment was reversed by the Supreme Court in an opinion by MR. JUSTICE SUTHERLAND.

The sole question for decision was whether the existence of § 3 of the Sherman Act precluded the adoption of the local act.

Section 3 of the Sherman Act declares illegal combinations in restraint of trade "in any territory of the United States or the District of Columbia" or in restraint of trade between the states or territories or foreign nations. Section 1 of the local act declares conspiracies in restraint of trade to be illegal, in substantially the same terms.

In dealing with the case, the Supreme Court first discussed the extent of the operation of the Federal Act and concluded that it extends to Puerto Rico. The fact that the Federal Act extends to Puerto Rico was thought, however, not to preclude the operation of the local law. In this connection the Court stated its inability to accept the conclusion of the Court below that Congress, by the Sherman Act, had preempted the field, and said:

"The court below held that although § 1 of the local act contained some words not to be found in § 3 of the Sherman Act, the pertinent provisions were in substance the same; that the act charged in the information as a crime under the local statute was the same as that denounced as a crime in the Sherman Act; and that in each instance the offense was a crime against the sovereignty of the United States. With that view we agree. But that court concluded that the act of Congress preempted the ground occupied by the local act and superseded it; and consequently the local district court was without jurisdiction of the offense. With that conclusion we are unable to agree."

Following this was an analysis of the Foraker Act of 1900 and the Organic Act of 1917, from which the Court concluded that the purpose of Congress was to confer power on the Puerto Rico legislature to legislate with respect to all local matters without limiting such power to subjects on which there was no express congressional legislation. This conclusion was stated as follows in the opinion of MR. JUSTICE SUTHERLAND:

"In the light of the foregoing considerations, including the sweeping character of the congressional grant of power contained in the Foraker Act and the Organic Act of 1917, the general purpose of Congress to confer power upon the government of Puerto Rico to legislate in respect of all local matters is made manifest. In this connection it is significant that the only express limitation upon the power is that, in certain of its aspects, it shall be exercised consistently with the provisions of the respective acts. . . Nothing is expressed in these acts or, so far as we are advised, in any other federal act which suggests a congressional intent to limit the exercise of the power of local legislation to those subjects in respect of which there is an absence of explicit legislation by Congress; and we find nothing in the nature of the power or in the consequences likely to ensue from the duplicate exercise of it which requires an implication to that effect."

The contentions of the respondents, that the coexistence of two statutes on the same subject would give rise to conflicting interpretations of the Acts, to duplication of prosecution and punishment, and to jurisdictional conflicts between local and federal courts, were all considered and found to be without merit.

The case was argued by Mr. William Cattron Rigby for the petitioner, and by Mr. William D. Whitney and Mr. James R. Beverly for the respondents.

Corporations—Liability of Stockholders for Contribution for Tax Assessed After Liquidation of Corporation

A stockholder who has paid a tax deficiency of his corporation, assessed after the corporation has been liquidated, is entitled to contribution from other stockholders, whether collection of the tax was under a special statutory provision, or by bill in equity.

Phillips-Jones Corporation vs. Parmley, 82 Adv. Op. 203; 58 Sup. Ct. Rep. 197.

The question presented for decision in this case was whether a stockholder who has paid a corporate tax deficiency is entitled to contribution from other stockholders. The corporation in question was wound up and its assets distributed ratably among its eleven stockholders in 1919. In 1924 and 1925 the Commissioner assessed additional taxes against the company which remained unpaid in the amount of $9,306.36. Phillips, a stockholder, had received liquidating dividends in excess of that amount and in 1926 the Commissioner assessed the amount of the unpaid tax against Phillips as transferee of the corporation's assets, pursuant to § 280 (a) (1) of the Revenue Act of 1926. No action was taken against any other stockholder.

Phillips having died, his executors contested the deficiency against the company and the assessment against Phillips, contending, among other things, that the Phillips estate could not be held liable for more than his pro rata share of the unpaid tax. But they were unsuccessful as to this claim.

Thereafter, the petitioner, a corporation which was the real owner of the stock standing in Phillips' name, paid the judgment and expenses of the litigation. It then brought suit for contribution against other stockholders. The District Court dismissed the bill for want of equity and its judgment was affirmed by the Circuit Court of Appeals. On certiorari, the Supreme Court reversed the judgment in an opinion by Mr. JUSTICE BRANDEIS.

Declaring that "The injustice of allowing the other stockholders to escape contribution is obvious", the Court found nothing in the statutes or unwritten law compelling such a result. In this connection it was emphasized that the liability of the stockholders for taxes was not created by § 280, but that such liability existed under a rule of law established long prior to the enactment of that provision, which rule established

also that as between stockholders the burden of paying the debts shall be borne ratably. But under § 280, however, the Commissioner was free to pursue Phillips alone for the entire amount and Phillips was unable to compel the joinder of other stockholders in the proceeding.

As to right of contribution, the Court pointed out that the stockholder paying the tax is justly entitled to the remedy of contribution, irrespective of whether the Commissioner has collected by bill in equity or by virtue of § 280. The existence of such right of contribution in the circumstances was stated by the Court as follows:

"The right of a stockholder transferee to contribution arises under the general law and does not differ from that of any other person who has paid more than his fair share of a common burden. The right to sue for contribution does not depend upon a prior determination that the defendants are liable. Whether they are liable is the matter to be decided in the suit. To recover a plaintiff must prove both that there was a common burden of debt and that he has, as between himself and the defendants, paid more than his fair share of the common obligations. Every defendant may, of course, set up any defense personal to him.

"Since the enactment of § 280, as before, a bill in equity against a stockholder transferee is a remedy available to the Commissioner to enforce the tax liability of the corporation. . . If he had resorted to that remedy he could have sued Phillips alone . . . and if thereupon Phillips had paid the entire tax, obviously he could have brought a bill in equity against the other stockholders for contribution. The right is no less where the Commissioner proceeds under § 280. This statute does not affect the duty of other stockholder transferees to contribute; it merely provides the Commissioner with a summary remedy for enforcing existing tax liability. . . As an incident of this summary remedy, the Commissioner must make an assessment against the stockholder or stockholders whom he elects to pursue. But, as each stockholder transferee is severally liable to the extent of the assets received by him, the Commissioner may pursue only one and need not make an assessment against other transferees. He elected to proceed only against Phillips; and as he succeeded in obtaining payment of the whole tax from Phillips' estate, he had no occasion to make an assessment against other stockholders. Indeed, after the corporation's tax had been paid he had no power to do so."

The case was argued by Robert T. McCracken for the petitioners. Margaret Wilkinson submitted the cause pro se.

Injunction—Discovery—Illinois Commerce Commission

In a proceeding pending before the Illinois Commerce Commission, to determine reasonable rates for gas, an affiliated company, not party to the proceedings, is not entitled to an injunction in a federal court to enjoin an order of the Commission requiring it to produce books and records, where it has failed to exhaust the administrative remedy provided by state law, whereby it could have sought adequate relief from the Commission.

Natural Gas Pipeline Co. of America vs. Slattery et al., 82 Adv. Op. 205; 58 Sup. Ct. Rep. 199.

On this appeal, a question was presented as to whether the federal district court had properly denied an interlocutory injunction, restraining the Illinois Commerce Commission from enforcing an order against the appellant, directing it to open its records and supply information for use in a proceeding pending before the Commission. The pending proceeding was for the purpose of fixing rates for gas sold in Illinois by the Chicago District Pipe Line Company. That company is an affiliated interest, within the meaning of the applicable Illinois statute, and transports gas through pipe lines from Oklahoma to points in Illinois, where, under a long term contract, it delivers it to the District Company. The latter is an Illinois corporation engaged in local commerce, selling gas purchased from the appellant. The District Company's rates are subject to regulation by the Illinois Commerce Commission under the State Public Utilities Act.

The Commission commenced a proceeding to determine whether the District Company's rates should be reduced, but the appellant was not a party to that proceeding. On evidence before it, the Commission found that the appellant was an affiliate of the District Company and that in order to fix reasonable rates for the latter, an inquiry was necessary into its operating charges, including cost of gas purchased from the appellant. Thereupon the Commission made an order directing the appellant to make available for the Commission's examination all accounts and records relating to transactions with the District Company and requiring the appellant to file a report of the cost of certain property and a statement of its income and expenses in connection with its business with the District Company.

The appellant, challenging the constitutional validity of the order, sought an interlocutory injunction from a federal district court of three judges. That court denied the application, holding that no case was made for equitable relief. On appeal, the decree was affirmed by the Supreme Court in an opinion by MR. JUSTICE STONE, primarily upon the ground that, under the circumstances, the appellant should have exhausted its administrative remedy before applying for equitable relief in a federal court.

The first point considered in the opinion was the appellant's contention that the statute is unconstitutional to the extent that it authorizes the Commission to obtain from the appellant's books information as to the reasonableness of the price of gas sold to the District Company. Although the appellant recognized that the absence of arms-length bargaining between the affiliates is sufficient to support such an inquiry, it urged that the statute infringes the commerce clause and the Fourteenth Amendment, because it authorizes an inquiry without proof of common control or absence of bargaining at arms-length; and that all inquiry as to the relations between the companies is forbidden in advance of proof of their common control or a failure to bargain at arms-length.

The Court, however, was of the opinion that no constitutional provision renders the appellant immune from giving information for a legislative or judicial inquiry even though it is engaged exclusively in interstate commerce, and that there is no constitutional rule limiting an inquiry into the reasonableness of public utility rates to cases where common control of two corporations exists through ownership of their voting stock.

The appellant also objected to the order as a first step in the direction of an unconstitutional action. But this objection was dismissed upon the ground that there was no showing that the Commission has taken or threatened any action prejudical to the appellant.

The appellant urged also that, by requiring expensive statistical reports, the order exceeds statutory

authority, or is so arbitrary as to place an undue burden on commerce and to infringe the Fourteenth Amendment, and that equity alone can afford relief because of cumulative penalties for disobedience to the order.

As to these objections, the Court found it unnecessary to pass on their merits, since the statute provided a sufficient administrative remedy which the appellant failed to invoke. In this connection, MR. JUSTICE STONE said:

"We have no occasion to consider the merits of these objections. It suffices to say that the statute itself provides an adequate administrative remedy which appellant has not sought. By §§ 64 and 65 of the Act the commission was authorized on its own motion or on application of appellant to order a hearing to ascertain whether the present order was 'improper, unreasonable or contrary to law.' Section 67 authorizes the commission at any time, upon proper notice and hearing, to 'rescind, alter or amend any . . . order or decision made by it.' We see no reason, and appellant suggests none, for rejecting the trial court's ruling that the commission, if asked, could have modified its order, or for concluding that the commission was without authority to suspend or postpone the date of the effective operation of the order so as to avoid the running of penalties, pending application for its modification.

* *

"The rule that a suitor must exhaust his administrative remedies before seeking the extraordinary relief of a court of equity, . . is of especial force when resort is had to the federal courts to restrain the action of state officers, . . and the objection has been taken by the trial court. . . .

"The extent to which a federal court may rightly relax the rule where the order of the administrative body is assailed in its entirety, rests in the sound discretion which guides exercise of equity jurisdiction. . . But there are cogent reasons for requiring resort in the first instance to the administrative tribunal when the particular method by which it has chosen to exercise authority, a matter peculiarly within its competence, is also under attack, for there is the possibility of removal of these issues from the case by modification of its order. Here the commission had authority to pass upon every question raised by the appellant and was able to modify the order. In such circumstances the trial court is free to withhold its aid entirely until administrative remedies have been exhausted."

The case was argued by Mr. Douglas F. Smith for the appellant, and by Mr. Harry R. Booth for the appellees.

Taxation—Gross Receipts—State Tax on Receipts Under Government Contract

A state tax on gross receipts is valid as applied to payments received by a contractor under a contract with the United States, where the tax is not discriminatory, and is not so burdensome as to interfere seriously with governmental functions.

James v. Dravo Contracting Company, 82 Adv. Op. 125; 58 Sup. Ct. Rep. 208.

In this case the question for decision was as to the constitutional validity of a West Virginia tax on gross receipts of the respondent, paid to it under contracts with the United States.

The respondent is a Pennsylvania corporation engaged as a general contractor, with its principal office and plant in Pittsburgh, Pennsylvania, and is licensed to do business in West Virginia. In 1932 and 1933 it made four contracts with the Government of the United States for river improvements in the Kanawha and Ohio Rivers. The State Tax Commissioner assessed the respondent $135,761.51 (taxes and penalties) on gross amounts received from the United States under these contracts. To enjoin collection of the taxes as constitutionally invalid, the respondent sued in a federal court in West Virginia. After a hearing before three judges a permanent injunction was granted. On appeal a reargument was directed by the Supreme Court and the Attorney General was asked to present the views of the Government, on the questions presented. Thereafter the decree was reversed by the Supreme Court by a divided bench, MR. CHIEF JUSTICE HUGHES delivering the prevailing opinion.

The opinion deals with two main questions: (1) the territorial jurisdiction of West Virginia to levy the tax, and (2) the constitutional validity of the tax as a burden on operations of the Government.

Since the State has jurisdiction to lay a tax only on operations within its territorial limits, the first question was resolved into two aspects, (1) as to work done outside the state, and (2) as to work done within West Virginia. The latter phase was again subdivided into three subdivisions, as to: (a) work done in the bed of rivers, (b) work done on property of the Federal Government on the banks of the rivers, and (c) work on property leased by the respondent and used for the accommodation of its equipment. As to work done outside of West Virginia it appeared that a large part of it was performed in Pennsylvania, such as preassembling, testing, fabricating and storing materials. As to these activities, the Court said:

"It is clear that West Virginia had no jurisdiction to lay a tax upon respondent with respect to this work done in Pennsylvania. As to the material and equipment there fabricated, the business and activities of respondent in West Virginia consisted of the installation at the respective sites within that State and an apportionment would in any event be necessary to limit the tax accordingly."

As to work done within West Virginia, the question was whether the Government had acquired exclusive jurisdiction over the various sites, it being recognized that the State would be powerless to lay the tax if the United States has acquired exclusive jurisdiction.

Turning first to work done in the beds of rivers, it was pointed out that title to the river beds remains in the State and that it has retained terriorial jurisdiction subject to the exercise of a dominant federal right.

The status most difficult to determine was that of lands acquired by the United States by purchase or condemnation. It appeared that lands on the river banks were acquired from private interests, the Government obtaining title in fee simple. The respondent contended that, under Article 1, Section 8, Clause 17 of the Constitution, the United States acquired exclusive jurisdiction. That clause provides:

"The Congress shall have power . . .

"To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-yards, and other needful Buildings."

In dealing with this question, the Court rejected the State's contention that the locks and dams in the present case were not needful buildings.

The Court observed also that the state legislature, by general statute had given its consent to acquisition of lands by the United States. Questions, however, were raised as to the construction and effect of the consent. After analysis of the State's consent, of arguments and

precedents, the Court pointed out that in many cases it may be advantageous to the Government as well as to the State to have the latter reserve concurrent jurisdiction over lands acquired, and concluded that nothing in Clause 17 requires that the State's consent must be without reservation. With respect to this, the opinion stated:

"The result to the Federal Government is the same whether consent is refused and cession is qualified by a reservation of concurrent jurisdiction, or consent to the acquisition is granted with a like qualification. As the Solicitor General has pointed out, a transfer of legislative jurisdiction carries with it not only benefits but obligations, and it may be highly desirable, in the interest both of the national government and of the State, that the latter should not be entirely ousted of its jurisdiction. The possible importance of reserving to the State jurisdiction for local purposes which involve no interference with the performance of governmental functions is becoming more and more clear as the activities of the Government expand and large areas within the States are acquired. There appears to be no reason why the United States should be compelled to accept exclusive jurisdiction or the State be compelled to grant it in giving its consent to purchases.

"Normally, where governmental consent is essential, the consent may be granted upon terms appropriate to the subject and transgressing no constitutional limitation. Thus, as a State may not be sued without its consent and 'permission is altogether voluntary' it follows 'that it may prescribe the terms and conditions on which it consents to be sued' . . . Treaties of the United States are to be made with the advice and consent of the Senate, but it is familiar practice for the Senate to accompany the exercise of this authority with reservations. . . The Constitution provides that no State without the consent of Congress shall enter into a compact with another State. It can hardly be doubted that in giving consent Congress may impose conditions. . .

"Clause 17 contains no express stipulation that the consent of the State must be without reservations. We think that such a stipulation should not be implied. We are unable to reconcile such an implication with the freedom of the State and its admitted authority to refuse or qualify cessions of jurisdiction when purchases have been made without consent or property has been acquired by condemnation. In the present case the reservation by West Virginia of concurrent jurisdiction did not operate to deprive the United States of the enjoyment of the property for the purposes for which it was acquired, and we are of the opinion that the reservation was applicable and effective."

As to property leased by the respondent and used to accommodate its equipment, the Court ruled that such property was clearly within the territorial jurisdiction of the State.

The questions of territorial jurisdiction of the State having been thus decided, and having been sustained except as to work done outside the State's boundaries, attention was given to the constitutional question whether the exaction is an undue burden on the operations of the Federal Government. In approaching this question, the Court stated that the Solicitor General of the United States had supported the State's contention that the tax is valid. In an analysis of the nature of the tax, the Court emphasized that it is not a tax on the United States, its property or officers; nor on an instrumentality of the United States, nor on any contract of the United States; and that it is not discriminatory. The application of the principle that one sovereign may not interfere, by taxation, with the operations of another, in our dual system, was dealt with as follows:

"The application of the principle which denies validity to such a tax has required the observing of close distinctions in order to maintain the essential freedom of government in performing its functions, without unduly limiting the taxing power which is equally essential to both nation and state under our dual system. In *Weston v. Charleston*, (2 Pet. 449), and *Pollock v. Farmers' Loan & Trust Co.*, (157 U. S. 429), taxes on interest from government securities were held to be laid on the government's contract—upon the power to borrow money—and hence were invalid. But we held in *Willcuts v. Bunn*, [282 U. S. 216] that the immunity from taxation does not extend to the profits derived by their owners upon the sale of government bonds. We said (*Id.*, p. 225): 'The power to tax is no less essential than the power to borrow money, and, in preserving the latter it is not necessary to cripple the former by extending the constitutional exemption of taxation to those subjects which fall within the general application of nondiscriminatory laws, and where no direct burden is laid upon the governmental instrumentality, and there is only a remote, if any, influence upon the exercise of the functions of government.'"

Following this, an analysis of certain precedents was set forth. Particular attention was given to the rulings in *Panhandle Oil Co. v. Knox*, 277 U. S. 218, and *Indian Motorcycle Co. v .United States*, 283 U. S. 570, one holding sales taxes invalid on sales to the United States and the other condemning a federal tax on the sale to a municipal corporation of Massachusetts. The Court declared that these cases have been distinguished, and must be limited to their peculiar facts.

In support of the tax, some reliance was placed upon *Alward v. Johnson*, 282 U. S. 509, which sustained a state tax upon gross receipts of an independent contractor carrying the mails, and on *Fidelity & Deposit Co. v. Pennsylvania*, 240 U. S. 319.

Summarizing his review of many cases, the CHIEF JUSTICE said:

"These decisions show clearly the effort of the Court in this difficult field to apply the practical criterion to which we referred in *Willcuts v. Bunn, supra*, and again in *Graves v. Texas Company, supra*. There is no ineluctable logic which makes the doctrine of immunity with respect to government bonds applicable to the earnings of an independent contractor rendering services to the Government. That doctrine recognizes the direct effect of a tax which 'would operate on the power to borrow before it is exercised' . . . and which would directly affect the government's obligation as a continuing security. Vital considerations are there involved respecting the permanent relations of the government to investors in its securities and its ability to maintain its credit,—considerations which are not found in connection with contracts made from time to time for the services of independent contractors. And in dealing with the question of the taxability of such contractors upon the fruits of their work, we are not bound to consider or decide how far immunity from taxation is to be deemed essential to the protection of government in relation to its purchases of commodities or whether the doctrine announced in the cases of that character which we have cited deserves revision or restriction.

"The question of the taxability of a contractor upon the fruits of his services is closely analogous to that of the taxability of the property of the contractor which is used in performing the services. His earnings flow from his work; his property is employed in securing them. In both cases, the taxes increase the cost of the work and diminish his profits. Many years ago the Court recognized and enforced the distinction between a tax laid directly upon a government contract or an instrumentality of the United States and a tax upon the property employed by an agent or contractor in performing services for the United States."

Following these and references to *Thompson v. Pacific Railroad*, 9 Wall. 579, and *Railroad Company v. Peniston*, 18 Wall. 5, *Metcalf & Eddy v. Mitchell*,

269 U. S. 514, was cited. That case sustained a federal income tax on the earnings of a contractor from services rendered to a political subdivision of a state. Since the reasoning in that decision was cited as controlling here, the Court's analysis of it is of special importance. As to it, MR. CHIEF JUSTICE HUGHES said:

"The question of immunity from taxation of the earnings of an independent contractor under a government contract arose in *Metcalf & Eddy v. Mitchell*, 269 U. S. 514. The services were rendered to a political subdivision of a State and the contractor's earnings were held to be subject to the federal income tax. That was a pivotal decision, for we had to meet the question whether the earnings of the contractor stood upon the same footing as interest upon government securities or the income of an instrumentality of government. It is true that the tax was laid upon net income. But if the tax upon the earnings of the contractor had been regarded as imposing a direct burden upon a governmental agency, the fact that the tax was laid upon net income would not save it under the doctrine of *Gillespie v. Oklahoma, supra*. And if the doctrine of the immunity of interest upon government bonds had been deemed to apply, the tax would have been equally bad whether the tax was upon net or gross income. The ruling in *Pollock v. Farmers' Loan & Trust Company, supra*, related to net income. The uniform ruling in such a case has been that the interest upon government securities cannot be included in gross income for the purpose of an income tax computed upon net income. The pith of the decision in the case of *Metcalf & Eddy* is that government bonds and contracts for the services of an independent contractor are not upon the same footing. The decision was a definite refusal to extend the doctrine of cases relating to government securities, and to the instrumentalities of government, to earnings under contracts for labor.

"The reasoning upon which that decision was based is controlling here. We recognized that in a broad sense 'the burden of federal taxation necessarily sets an economic limit to the practical operation of the taxing power of the States and *vice versa*.' 'Taxation by either the state or the federal government affects in some measure the cost of operation of the other.' As 'neither government may destroy the other, or control in any substantial manner the exercise of its powers,' we said that the limitation upon the taxing power of each, so far as it affects the other, 'must receive a practical construction which permits both to function with the minimum of interference each with the other; and that limitation cannot be so varied or extended as seriously to impair either the taxing power of the government imposing the tax . . . or the appropriate exercise of the functions of the government affected by it' . . .

"We said further that the nature of the governmental agencies or the mode of their constitution could not be disregarded in passing on the question of tax exemption, as it was obvious that an agency might be of such a character or so intimately connected with the exercise of a power or the performance of a duty by the one government 'that any taxation of it by the other would be such a direct interference with the functions of government itself as to be plainly beyond the taxing power.' And it was on that principle that 'any taxation by one government of the salary of an officer of the other, or the public securities of the other, or an agency created and controlled by the other, exclusively to enable it to perform a governmental function,' was prohibited. We concluded that a non-discriminatory tax upon the earnings of an independent contractor derived from services rendered to the Government could not be said to be imposed 'upon an agency of government in any technical sense' and could not 'be deemed to be an interference with government or an impairment of the efficiency of its agencies in any substantial way' . . .

"While the *Metcalf* case was one of a federal tax, the reasoning and the practical criterion it adopts are clearly applicable to the case of a state tax upon earnings under a contract with the Federal Government."

The respondent relied upon decisions in the field of interstate commerce holding invalid taxes upon the gross income of a taxpayer derived from interstate commerce; but these cases were distinguished on the ground that persons engaged in such commerce have immunity in their own right, whereas the respondent's claim is that the tax is a burden on the Government. The latter was characterized as derivative from the Government, but one which the Government disclaims.

In conclusion, the Court noted that the ultimate basis of the attack on the tax is that the exaction increases the Government's cost of operations. In rejecting this basis, the Court expressed the view that that is not always the result of such a tax and, furthermore, that even so it would not necessarily invalidate the tax. This view of the matter was amplified as follows:

"The contention ultimately rests upon the point that the tax increases the cost to the Government of the service rendered by the taxpayer. But this is not necessarily so. The contractor, taking into consideration the state of the competitive market for the service, may be willing to bear the tax and absorb it in his estimated profit rather than lose the contract. In the present case, it is stipulated that respondent's estimated costs of the respective works, and the bids based thereon, did not include, and there was not included in the contract price paid to respondent, any specified item to cover the gross receipts tax, although respondent knew of the West Virginia act imposing it, and respondent's estimates of cost did include 'compensation and liability insurance, construction bond and property taxes.'

"But if it be assumed that the gross receipts tax may increase the cost to the Government, that fact would not invalidate the tax. With respect to that effect, a tax on the contractor's gross receipts would not differ from a tax on the contractor's property and equipment necessarily used in the performance of the contract. Concededly, such a tax may validly be laid."

The decree was reversed for further proceedings in conformity with the opinion.

MR. JUSTICE ROBERTS delivered a dissenting opinion in which MR. JUSTICE MCREYNOLDS, MR. JUSTICE SUTHERLAND and MR. JUSTICE BUTLER joined.

Regretting his inability to concur in the Court's opinion, MR. JUSTICE ROBERTS stated that the judgment, by implication, seems to overrule a century of precedents and to leave the application of the rule uncertain and unpredictable.

Preliminary to an analysis of the instant case he described the origin of the principle in question in these terms:

"The doctrine which forbids a state to interfere with the exercise of federal powers does not have its origin in the common law exemption of the sovereign from regulation or taxation. It springs from the necessity of maintaining our dual system of government. 'The attempt to use it [the power of taxation] on the means employed by the government of the Union, in pursuance of the constitution, is itself an abuse, because it is the usurpation of a power which the people of a single State cannot give. We find, then, on just theory, a total failure of this original right [of the states] to tax the means employed by the government of the Union, for the execution of its powers.' 'The immunity is derived from the Constitution in the same sense and upon the same principle that it would be if expressed in so many words.'"

In the dissent, it was agreed that the tax is not upon the Government itself, or upon its property or officers, and it was also recognized that the respondent

is not an agency or instrumentality of the United States.

Notwithstanding this, MR. JUSTICE ROBERTS was of the opinion that the tax directly burdens and impedes operations of the Government, within the scope of the principle of immunity. In explanation of this view, he said:

"I agree that the challenged tax is not, in terms, laid upon the contract of the government, but I am of opinion that it directly burdens and impedes the operations of the United States within the reason and scope of the principle of immunity and according to the application of that principle in numerous decisions of the court. If this be so, the fact that the exaction is not in terms upon the contract with the government, the appellee is an independent contractor, the tax is non-discriminatory, or that it is not excessive in amount cannot serve to exculpate the statute from the charge that it transgresses the rule. These considrations, as repeatedly held, are irrelevant where the tax falls directly, immediately, and palpably upon an operation of the federal government or a means chosen for the exercise of its powers."

Then followed a discussion of decisions dealing with the proper application of the rule of immunity of operations of each sovereign from taxation by the other. The decisions cited include, among others, those involving taxes on one contracting with the Government, such as a tax on a telegraph company on messages transmitted by the Government, a tax on United States certificates of indebtedness, payable in the future and issued in payment for supplies, a sales tax on commodities sold to the Government, and a tax on storage or withdrawal from storage essential to the sale of a commodity contracted to be delivered to the United States. Taxes of this type were cited as illustrations of forbidden burdens on governmental operations and were distinguished from various other imposts 'which bear merely upon the obligee of a government contract for the exercise of the privilege having no relation to the contractual nexus between him and the government . . .' Illustrations of the latter form of tax included franchise taxes measured by assets or income, which include federal securities or interest thereon, and death taxes on the transfer of federal securities.

Special emphasis was placed on *Panhandle Oil Co. v. Mississippi*, 277 U. S. 218, *Indian Motorcycle Co. v. United States*, 283 U. S. 570, and *Graves v. Texas Co.* 298 U. S. 393, and it was pointed out that the Solicitor General conceded that they must be overruled, if the test proposed by him should be adopted, namely, that validity depends on whether the statute discriminates against the Government and in favor of other taxpayers.

Commenting on the test proposed, and pointing out that it is not clear how far the majority has adopted that test, MR. JUSTICE ROBERTS said:

"The Solicitor General as *amicus curiae* proposes a single test of the constitutionality of a state tax upon the operations of the United States, or the means chosen for the execution of its powers. That test is whether the taxing statute discriminates against the government and in favor of other taxpayers. He frankly admits that if the proposed criterion be adopted we must overrule *Indian Motorcycle Company v. United States*, 283 U. S. 570; *Panhandle Oil Company v. Mississippi, supra;* and *Graves v. Texas Company*, 298 U. S. 393. He professes himself, as I am, unable to distinguish a sales tax or a tax upon storage preliminary to sale to the United States from a gross receipts tax upon goods and services furnished the government. In brief filed as *amicus curiae* in *Graves v. Texas Company, supra*, he urged the court to hold such a tax imposed on gasoline under contract to the United States invalid as an unconstitutional impediment and burden upon the operations of the government. It is said that these cases have been distinguished. But in the cases distinguished from them the tax was found to be one on the property of a contractor with the United States, or on its net income, not on the gross receipts of his contract with the government. To distinguish them from the present case is not to rely upon any principle but upon the mere name or label given to a tax. Such distinctions only serve to confuse.

"I do not think the Solicitor General in brief or argument answered the question propounded by the court in the present case: whether the tax is invalid as laying a burden upon the operations of the federal government. He responds that the tax is valid in spite of the fact that it lays such a burden. Thus he states: 'We have indicated that a tax upon the contractor, the sole result of which is to increase the cost to the sovereign by the amount of the normal tax burden, presents no interference with its operations.' Again he says that the imposition of the tax in question 'is in no sense a threat to the capacity of the government to perform its functions.'

"Thus it appears that, in his view, a non-discriminatory state tax is to be judged not by the 'burden' it imposes, but by the extent of its 'interference' with the functioning of government. If this be the test, no tax, however great, can prevent such functioning, so long as the United States' taxing and borrowing powers remain adequate to meet the ordinary expenses of its operations and the added cost of state taxes thereon. The adoption of any such theory would require the overruling not only of the three decisions the Solicitor General singles out for deletion, but literally scores of others, beginning with *McCulloch v. Maryland* and ending with *Graves v. Texas Co.*, 298 U. S. 393, decided at the 1935 term in accordance with the views then earnestly pressed upon us by the Solicitor General.

"It is not clear to what extent the court's opinion adopts the doctrine advocated by the government. It is said merely that the appellee is an independent contractor, that the tax is non-discriminatory and is not laid upon the contract of the government; and it is suggested that if in the view of Congress the burden of such a tax becomes too heavy, Congress has the means of redress. Whether one or all of these factors is requisite to justify the exaction we are not told."

The dissenting opinion also stressed the point that the validity of the tax does not turn on whether it is exorbitant or merely a "normal tax burden." Criticizing the validity of this as a test, MR. JUSTICE ROBERTS said:

"Chief Justice Marshall denied the existence of the power. From that day to this the court has consistently held that the question is not one of quantum, not one of the weight of the burden, but one of power. . .

"No one denies the competence of the Congress to waive the immunity in whole or in part. But this is the reverse of saying the power to tax federal means and operations exists in the states subject to veto by Congress of any exorbitant exercise of the power. And it may be pertinent to suggest that, if, as the court has always held, the immunity is reciprocal, the state legislatures, by a parity of reasoning, ought to have the power to prohibit federal taxes upon state operations, if they be deemed immoderate.

"It must be evident that if the principle of federal immunity is to be preserved, if all that the court has said respecting it is not to be set aside, the gross receipts tax under review cannot be rescued from condemnation by the circumstances that it bears upon an independent contractor, does not discriminate, and is not so burdensome as seriously to interfere with governmental functions."

The case was argued by Mr. Clarence W. Meadows for the appellant, and by Mr. William S. Moorhead for the appellee, and by Mr. Solicitor General Reed for the United States as *amicus curiae* by special leave of court.

Constitutional Law—Territorial Jurisdiction of States and United States

Under the Constitution, the consent of a State to the acquisition of lands within its borders by the United States, for the latter's purposes, may be given with a reservation to the State of concurrent legislative authority, consistent with the Federal enterprise. There is no constitutional requirement that the United States must acquire exclusive legislative authority.

Silas Mason Co., Inc., vs. Tax Commission of Washington, 82 Adv. Op. 154; 58 Sup. Ct. Rep. 233.

In this case the question presented as to the constitutional validity of a state tax was similar to that involved in *James v. Dravo Contracting Company*, herewith reviewed, and as to such question that case was held to be controlling.

In addition, there was also involved the issue whether the work, from which the gross receipts subject to tax were derived, was performed on lands subject to the exclusive legislative jurisdiction of the United States.

The validity of the tax and the State's territorial jurisdiction were both sustained by the State Supreme Court in the two cases under review, and on appeal the judgments of that court were affirmed by the Supreme Court in an opinion by MR. CHIEF JUSTICE HUGHES. Here, as in the Dravo case, the Solicitor General supported the decree of the court below.

The gross receipts held subject to tax were received by the appellants under the contracts with the United States whereby they undertook construction work on the Columbia Basin Project and the Grand Coulee Project. The lands involved were divided into three classes: (a) lands acquired by the United States from the State of Washington; (b) lands acquired from individual owners through purchase or condemnation, and (c) Indian tribal lands.

The limited scope of the issues involved was stated by the Court, as follows:

"No question is presented as to the constitutional authority of Congress to provide for this enterprise or to acquire the lands necessary or appropriate for that purpose. There is no contention that the State may interfere with the conduct of the enterprise. The question of exclusive territorial jurisdiction is distinct. That question assumes the absence of any interference with the exercise of the functions of the Federal Government and is whether the United States has acquired exclusive legislative authority so as to debar the State from exercising any legislative authority including its taxing and police power in relation to the property and activities of individuals and corporations within the territory. The acquisition of title by the United States is not sufficient to effect that exclusion. It must appear that the State, by consent or cession, has transferred to the United States that residuum of jurisdiction which otherwise it would be free to exercise."

After a review of all the facts and pertinent legislation on the subject, the Supreme Court concluded that as to no class has exclusive federal jurisdiction been established.

The conclusion of the Court that the lands acquired from the State were not subject to exclusive federal legislative authority was stated as follows:

"Neither in the statutes governing the proceeding initiated by the Secretary of the Interior nor in the state statute was there provision for acquisition by the United States of exclusive legislative authority over the lands of the State to which title was thus obtained. This is true with respect to all the lands mentioned in the Secretary's notice embracing the bed of the river, the shore lands and the designated uplands including school lands."

As to lands acquired by purchase or condemnation from individuals, the Court reached the following conclusion:

"Appellants' argument comes to this—that we must not only override the construction of the state statute by the state court but that we must construe the statute as compelling the Federal Government to assume an exclusive legislative authority which it did not need, which it has not accepted or exercised, and against the burden of which it has sought to protect itself by securing state cooperation in accordance with the express authorization of Congress. We find no warrant for such action."

The analysis and conclusion set forth as to the first two classes of lands were found controlling also as to the Indian tribal lands, and they too were found to be not subject to exclusive federal legislative authority.

MR. JUSTICE MCREYNOLDS, MR. JUSTICE SUTHERLAND, MR. JUSTICE BUTLER and MR. JUSTICE ROBERTS dissented for the reasons set forth in the dissenting opinion in *James v. Dravo Contracting Company*.

The case was argued by Mr. B. H. Kizer for the appellants and by Mr. E. P. Donnelly for the appellees.

David H. Ryan vs. State of Washington, et al, involving the same question, was also affirmed in the same opinion. Messrs. E. D. Weller and B. H. Kizer argued the cause on original argument for appellant, and Mr. John W. Davis on reargument. Messrs. E. W. Schwellenbach and E. P. Donnelly argued the cause for appellees on both the original argument and reargument.

Summaries of Holdings in All Other Opinions in December

Government Securities—Acceleration of Maturity—Right to Interest—Gold Clause

Smyth, Executor, etc. v. United States; Dixie Terminal Co. v. United States; United States v. Machen. 82 Adv. Op., 58 Sup. Ct. Rep. [Nos. 42, 43, and 198, Decided December 13, 1937].

Certiorari to review two judgments of the Court of Claims and one of the Circuit Court, all involving the single question whether a notice of call issued by the Secretary of the Treasury for redemption of Liberty Loan Bonds was effective to terminate running of interest on the bonds from the designated redemption date. The bonds provided that they might "be redeemed and paid at the pleasure of the United States" on or after a fixed redemption date, "or on any semi-annual interest payment date . . . at the face value and interest accrued at the date of redemption on notice published at least three months prior to the redemption date . . ." and that "from the date of redemption designated in any such notice interest on the bonds called for redemption shall cease." Each bond provided that principal and interest should be "payable in United States gold coin of the present standard of value. . . ." The Secretary issued a notice of call for redemption on an interest date prior to that fixed for payment in the bond. This notice was published after the passage of the Joint Resolution of 1933 by which all gold obligations were required to be discharged dollar for dollar in lawful currency, and which declared void as against public policy all provisions calling for gold payments. On the date specified in the Secretary's notice, the fiscal agents of the United States were ready to redeem in legal tender currency, but had not been instructed by

the Secretary to redeem in gold coin. The holders of the bonds in two cases demanded redemption in gold or its equivalent in dollars under the bond. This was refused, and each bondholder brought suit for payment in current dollars of the interest that would have been due on the date of suit had the date of maturity not been accelerated.

The Court's opinion by MR. JUSTICE CARDOZO held that the effect of the exercise by the Government of the "redemption" provisions of the bond was to accelerate the maturity date so that, upon publication of the notice the new date was substituted as if it had been there at the beginning. Therefore, on the new date of maturity the right to receive interest ceased, just as it would have ceased after the fixed date of maturity if the notice had not been issued. The opinion examines the bond holders' contention that the notices here were inadequate to accelerate maturity, because when supplemented by the gold clause resolution of Congress the payment to be made is not the payment promised in the letter of the bond. The opinion rejects this contention on the ground that the call merely gave notice that, on the accelerated date, the Government would pay whatever might be due under the bond and that the existing law at the payment date would determine what is payable. Thus the Secretary of the Treasury's belief as to what might be the measure of payment at that time were of no controlling importance in relation to the notice of call. The opinion also rejects the contention that the existence of the joint resolution amounted to an anticipatory breach voiding the notice from its inception on the election of the bond holder for the reason that the contract is a unilateral one to which the doctrine of anticipatory breach is not applicable, and because in any event its application would not effect the rights of bond holders to postpone the time of payment, and because the Government was not under a duty under the contract to keep dollar value constant throughout the duration of the obligation.

As to the contention that because on the date of payment the gold resolution remained unrepealed, the notices became nullities at that time, if not before, the opinion concludes that at the payment date, accelerated maturity was an accomplished fact. This gave the bond holder only a right to receive whatever payment of the principle was in accordance with law, and, regardless of the validity of the form and measure of payment of the principle, the right to interest did not remain.

The opinion also expressly states that no question of constitutional law is involved in the court's decision and that irrespective of the validity of any monetary legislation, the maturity of the bonds was accelerated by valid notice and the right to interest had ended.

The Court also rejects the contention that the Secretary's call was issued without authority of Congress and it determines that the Act of March 18, 1869, which placed restrictions upon the redemption by the government of interest-bearing bonds, is no longer binding and is, therefore, inapplicable.

MR. JUSTICE MCREYNOLDS, MR. JUSTICE SUTHERLAND and MR. JUSTICE BUTLER dissented.

MR. JUSTICE STONE concurred in the result, in a separate opinion, in which he declared that the government's privilege to accelerate maturity, was conditioned by the terms of the bond upon "redemption" which in turn depends not only upon notice but also upon payment, or readiness to pay in accordance with the terms of the obligation; that because the bonds promised payment in gold dollars or their equivalent, the privilege of acceleration had not in these cases been properly exercised, unless the gold clause resolution of Congress is valid legislation. He then examines the constitutionality of this resolution, and concludes that it was a constitutional exercise of the power to regulate the value of money, and that it is equally applicable to gold payment clauses in government bonds as it is to those in bonds issued by private individuals.

MR. JUSTICE BLACK concurred separately, with a statement that since he agreed with the opinion of MR. JUSTICE CARDOZO, he did not consider it appropriate to express any opinion as to the validity of the gold clause resolution.

The dissenting opinion of MR. JUSTICE MCREYNOLDS in which MR. JUSTICE SUTHERLAND and MR. JUSTICE BUTLER joined, concludes that the notice of the secretary did not operate to accelerate the date of payment, because, since the United States did not in good faith intend to redeem and pay the bond in accordance with its terms, i. e., that it be paid in gold or its equivalent, an essential condition precedent upon which the option to mature depends had not been performed.

The case was argued November 18, 1937, by Mr. Robert A. Taft for the petitioners in Nos. 42 and 43 and by Mr. Solicitor General Reed for the United States and by Mr. H. Vernon Eney for the respondent, in No. 198.

National Banks—Insolvency—Partnership—Set-Off—Rules of Decisions

Willing, Receiver, etc. vs. Binenstock, individually, etc., et al. 82 Adv. Op. 196, 58 Sup. Ct. Rep. 175. [No. 36, decided December 6, 1937.]

Certiorari to review a circuit court judgment involving the right of the surviving member of a partnership to have allowed as a set-off to a joint firm indebtedness to an insolvent national bank, the amount of the individual deposits of the partners in that bank.

The Court, in an opinion by MR. JUSTICE SUTHERLAND, held that the District and Circuit Courts had not incorrectly construed the state law of Pennsylvania as allowing individual claims to be set-off in equity against a joint liability even though the party asserting the joint liability is solvent, and agreed with that interpretation of the Pennsylvania decisions. The opinion also finds that there is no conflict on this point between decisions of the state courts and those of the lower federal courts and that, therefore, there is no need to consider the applicability of the Rules of Decisions Act as interpreted in *Swift v. Tyson* 16 Pet. 1, and it finds that the application of the Pennsylvania rule does not conflict with the National Banking Act provisions (12 U. S. C. 194) for a "ratable dividend" on all proved or adjudicated claims. It therefore approved that part of the judgment which allowed the set-off of the deposits against the partnership's own notes.

As to that part of the circuit court holding which required the surrender by the bank to the partner of a note executed to the partnership and discounted for it by the bank, the opinion finds that if the maker was solvent, such a set-off of the partnership secondary liability as endorser was improper, since it would enable the endorser to collect the full amount of the note by indemnity from the maker and at the same time to

receive a larger amount of his deposit than other depositors. Therefore, the Court remanded the case for further consideration of the maker's solvency.

The case was argued November 17, 1937, by Mr. James M. Kane and Mr. George P. Barse, for petitioner, and by Mr. Robert T. McCracken for the respondent.

Reinsurance—Liability of Reinsurer

Fidelity & Deposit Company of Maryland vs. Pink. 82 Adv. Op. 200, 58 Sup. Ct. Rep. 162. [No. 38, Decided December 6, 1937.]

Certiorari to the Circuit Court involving the question of liability of a reinsurer under the 1930 standard form of reinsurance agreement. The Court, in an opinion by MR. JUSTICE MCREYNOLDS held that in the light of surrounding circumstances the wording of the form requires proof of payment by the reinsured as a prerequisite to the reinsurer's liability and that proof of liability to pay is not sufficient.

THE CHIEF JUSTICE took no part in the case.

The case was argued on November 18, 1937, by Mr. Harold L. Smith for the petitioner and by Mr. Irvin Waldman for the respondent.

Constitutional Law—Due Process—Privileges and Immunities—Criminal Law—Appeals by State—Double Jeopardy

Palko v. Connecticut. 82 Adv. Op. 220, 58 Sup. Ct. Rep. 149. [No. 135, Decided December 6, 1937.]

Appeal from the Supreme Court of Errors of Connecticut involving the constitutionality of a state statute (Conn. Gen. Stat., § 6494) permitting appeals in criminal cases to be taken by the state. The statute was challenged as in conflict with the due process and privileges and immunities clauses of the Fourteenth Amendment because it puts the accused in double jeopardy.

In an opinion by MR. JUSTICE CARDOZO the Court examines the argument that whatever would be a violation of the original bill of rights (of which the Fifth Amendment, creating immunity from double jeopardy, is a part) if done by the Federal Government is equally unlawful by force of the due process clause of the Fourteenth Amendment if done by a state. This rule the opinion rejects, and draws a line of demarcation between prohibitions of the bill of rights which are part of due process and those which are not. The test is based on whether "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions" will be violated if the prohibition is not observed. The opinion concludes that the statute under consideration does not cause such a violation and, therefore, that the due process clause of the Fourteenth Amendment is not contravened by the statute. The opinion also rejects the argument that the statute is in derogation of any privileges or immunities of a citizen of the United States.

MR. JUSTICE BUTLER dissented.

The case was argued November 12, 1937, by Mr. David Goldstein and Mr. George A. Saden for the appellant and by Mr. Wm. H. Comley for the appellee.

Injunctions—Anti-Trust Laws—Prior Adjudication

Aluminum Company of America v. United States. 82 Adv. Op. 211, 58 Sup. Ct. Rep. 178. [No. 281, Decided December 6, 1937.]

Appeal to review decision of a Pennsylvania district court denying injunction against prosecution of proceeding in New York district court under Anti-Trust laws. The Company argued that a consent decree, still in force and entered in 1912 in a prior suit in the Pennsylvania Court against it as sole defendant which cancelled some provisions of certain contracts and forbade future violation of Anti-Trust laws by it and its representatives, was so similar to the suit now being prosecuted in New York against it and its officers, agents, stockholders and others as defendants, charging violation of the Anti-Trust laws and seeking injunctions, dissolution, rearrangement of properties, etc., as to subject the Company to the peril of concurrent decrees on the same subject matter, and to make possible conflicting orders.

The Court in an opinion by MR. JUSTICE MCREYNOLDS held that the findings of the district court that the subject matter, parties, issues, and relief sought in the New York suit differed substantially from those adjudicated in the 1912 decree, and that no irreparable injury or peril would result from the prosecution of the New York suit were adequately supported in the record, and concluded that the injunction was therefore properly denied. The CHIEF JUSTICE and MR. JUSTICE STONE took no part in the case.

The case was argued on November 8 and 9, 1937, by Mr. William Watson Smith for the appellant and by Mr. Assistant Attorney General Jackson for the appellee.

Poll Taxes—Constitutionality—Right of Suffrage

Breedlove vs. Suttles, Tax Collector. 82 Adv. Op. 166, 58 Sup. Ct. Rep. 205. [No. 9, Decided Dec. 6, 1937.]

Appeal from Supreme Court of Georgia involving constitutionality of certain Georgia laws which impose poll tax of one dollar on every inhabitant between ages 21 and 60, except the blind and except females who do not register for voting, and which make payment of the tax a prerequisite to voting. These provisions were challenged on three grounds: (1) that by the age provisions and the exemption of women who do not register, they violate the equal protection clause of the Fourteenth Amendment; (2) that the requirement of payment as a prerequisite of voting violates the privileges and immunities clause of the Fourteenth Amendment; (3) that the exaction of payment before registration violates the Nineteenth Amendment because it abridges, on account of their sex, the right of men to vote.

The Court, in an opinion by MR. JUSTICE BUTLER, found (1) that special considerations existed to justify the exemptions and this being so, the lack of absolute equality does not invalidate the statutes under the Fourteenth Amendment; (2) that the privileges and immunities clause of the Fourteenth Amendment is inapplicable since the privilege of voting is not derived from the United States but is conferred by the states and, within limits, may be conditioned as the state deems appropriate; (3) that the purpose of the Nineteenth Amendment is not to regulate the levy and collection of taxes, and that the registration provisions

of the statute being justified in reason as an essential means for collecting the tax, they do not violate the Amendment.

The case was argued November 17, 1937, by Mr. J. Ira Harrelson and Mr. Henry G. Van Veen for appellant and by Mr. W. S. Northcutt and Mr. E. Harold Sheets for appellee.

Probation—Jurisdiction of District Courts and Judges

Frad vs. Kelly, United States Marshal, etc. 82 Adv. Op. 214, 58 Sup. Ct. Rep. 188. [No. 87, Decided December 6, 1937.]

Certiorari to the circuit court to review the validity of certain proceedings under the Federal Probation Act of March 4, 1925. The opinion, by MR. JUSTICE ROBERTS sets forth the facts fully and concludes (1) that under sections 1 and 2 of the probation act the court had the power to suspend the imposition of sentence on pleas of guilty to two indictments and at the same time to place defendant on probation effective after completion of service of sentence on a third indictment; (2) that a judge of a district other than that in which the probation is being carried out, is without authority under the probation act to act upon an application for termination of probation and this is true even though the judge to whom the application is presented is the judge who, while temporarily assigned under § 18 of the Act of March 3, 1911, to the district in which the Criminal Trial was held and the probation is being administered, presided at the original trial of the probationer; since the authority of such an assigned judge to entertain new proceedings is terminated upon his return to his own district; (3) that the mere fact that on the application for termination, the government and the probation officer for the district of conviction have appeared before the assigned judge after his return to his own district, does not wave the question of the judges authority to act or estop the government from raising it since these requirements are jurisdictional, are fixed by the probation act, and cannot be altered by the conduct of the United States attorney or the probation officer.

The case was argued November 9, 1937, and November 10, 1937, by Mr. Harris Jay Griston for the petitioner.

National Banks—Pledges—Public Funds

McNair, as receiver, etc. v. Knott, as Treasurer of the State of Florida, etc. 82 Adv. Op. 246, 58 Sup. Ct. Rep. 245. [No. 32, Decided December 13, 1937.]

Certiorari to the circuit court to determine the validity of a pledge by a National Bank of collateral securities for protection of county funds deposited in the bank. The pledge was made before the passage of the National Bank Enabling Act Amendment of June 25, 1930, which expressly permitted such a bank to give security for the payment of public money deposited with it.

The Court's opinion by MR. JUSTICE BLACK holds that the enabling act was intended to ratify pledges made prior to its passage even though they were *ultra vires* at the time they were made, and that the invalidity of such a contract of pledge might be thus cured by subsequent legislation.

MR. JUSTICE MCREYNOLDS concurred on the ground that, subsequent to the enabling amendment both parties had recognized an existing obligation to observe the pledge agreement, and that the result was the same as if the assets had been repossessed by the bank after the passage of the amendment and again hypothecated under an agreement identical with the original one.

The case was argued November 10, 1937, and November 11, 1937, by Mr. J. Turner Butler and Mr. George P. Barse for petitioner and by Mr. J. Compton French for respondents.

Criminal Appeals—Bill of Exceptions—Power of Appellate Court

Forte v. United States, 82 Adv. Op. 226, 58 Sup. Ct. Rep. 180. [No. 459, Decided December 6, 1937.]

On certified questions from the Court of Appeals for the District of Columbia, the Court, in a *per curiam* opinion, held that in a criminal case, when a bill of exceptions has been prepared, agreed to by counsel for both sides, and filed with the clerk of the District Court, within the prescribed time, but has not been settled and signed by the trial judge within that time, although it was signed thereafter, the bill is not settled and filed in time within the meaning of Rule IX of the criminal appeal rules. The opinion further holds that under Rule IV, the Circuit Court could have corrected this omission or any other in the settlement of the bill of exceptions at any time after the duplicate notice of appeal was filed with it, if the interests of justice required it, and that this power of the Circuit Court is not lost by reason of the fact that in this case the question was not brought to its attention until after that court had heard argument and decided the case as if the bill of exceptions was properly before it. The opinion concludes therefore, that it is not necessary for the Circuit court under such circumstances to strike the bill of exceptions and rehear the case.

The case was argued November 15, 1937, by Mr. Henry A. Schweinhaut for the United States.

Criminal Appeals—Finality of Sentence

Berman vs. United States. 82 Adv. Op. 212, 58 Sup. Ct. Rep. 164. [No. 26, Decided December 6, 1937.]

Certiorari to review a judgment of the circuit court involving the finality for purposes of appeal of a sentence of imprisonment, the execution of which had been suspended and immediately after which the prisoner had been placed upon probation. Here, after suspension and probation, the prisoner appealed. Pending this appeal he was resentenced, this sentence was also suspended, and in addition a fine was imposed. The prisoner also appealed from the second sentence. The circuit court held the first and second sentences to be interlocutory by reason of the suspension of execution and, therefore, not appealable. It affirmed the judgment imposing a fine.

The opinion by MR. CHIEF JUSTICE HUGHES holds that conviction becomes an appealable final judgment at the time at which sentence is imposed, that the sentence does not become interlocutory because of subsequent suspension or probation, that, therefore, the first

appeal was proper and the district court was without jurisdiction, during its pendency, to modify its judgment by resentencing.

The case was argued November 9, 1937, by Mr. Samuel H. Kaufman for petitioner and by Mr. William W. Barron for respondent.

Criminal Law—False Claims—Indictment for Violation of Unconstitutional Statute

United States v. Kapp, et al. 82 Adv. Op. 218, 58 Sup. Ct. Rep. 182. [No. 97, Decided December 6, 1937.]

Appeal from a judgment of the district court which sustained a demurrer to an indictment charging under the "false claims" statute (§ 35 of the Criminal Code) a conspiracy to defraud the United States by furnishing false information to the Secretary of Agriculture in order to secure benefit payments under the Agricultural Adjustment Act of May 12, 1933.

The opinion by MR. CHIEF JUSTICE HUGHES holds (1) that since the statute at the violation of which the conspiracy is aimed is the statute upon which the indictment is founded, an appeal is within the jurisdiction of the Supreme Court; (2) that the court below did not construe the indictment, as appellee contends, but construed the statute, since it rested its decision upon applicability of the "false claims" statute in view of the constitutional invalidity of the Agricultural Adjustment Act; (3) that the construction of the false claims statute adopted by the district court (that there is no violation of the false claims statute since the Agricultural Adjustment Act which provides for such claims is invalid) cannot be sustained because regardless of the validity of the Agricultural Adjustment Act, the offense charged would be equally a "false claim" within the meaning of the criminal statute.

The case was argued on November 12, 1937, by Mr. Assistant Attorney General McMahon for the appellant and by Mr. Wm. J. Hughes, Jr., for the appellees.

Criminal Law—Indictment—Liquor Violations

Fleisher v. United States, Same vs. Same, and *Stein v. United States.* 82 Adv. Op. 225, 58 Sup. Ct. Rep. 148. [Nos. 202, 203, and 204, Decided December 6, 1937.]

Certiorari to circuit court to review conviction on account of an indictment which charges defendant with conspiring "to possess—stills and apparatus for the production of distilled spirits without having the same registered with the Collector of Internal Revenue." It was conceded that under applicable law the charge should have been that there was a failure to register the stills with the District Supervisor of the Alcohol Tax Unit in the Bureau of Internal Revenue.

The Court, in a *per curiam* opinion, held that the count upon which sentence was imposed is invalid because it did not state an offense under federal law, and that, therefore, sentences on the remaining courts, each of which ran from the expiration of the term imposed by the preceding court, should be amended to fix a definite date of commencement.

The case was argued November 15, 1937, by Mr. Bates Booth for respondent and cases submitted by Mr. Isidore G. Stone, Mr. Alfred A. May, and Mr. Arthur H. Ratner for petitioners.

Evidence — Federal Communications Act — Crime Detection—Wire Tapping

Nardone, et al., vs. The United States. 82 Adv. Op. 250; 58 Sup. Ct. Rep. 275. [No. 190, decided December 20, 1937.]

Certiorari to the circuit court to review a district court conviction in a liquor violation case. The conviction was based upon the testimony of Federal agents as to the substance of certain interstate communications overheard by them by tapping telephone wires.

The Court, in an opinion by MR. JUSTICE ROBERTS, held that § 605 of the Federal Communications Act which provides that no person may intercept and divulge or publish any interstate communication by wire is applicable to Federal agents and that the judgment of conviction is, therefore, erroneous.

MR. JUSTICE SUTHERLAND wrote a dissenting opinion in which MR. JUSTICE MCREYNOLDS joined. He contends that the word "person" as used in the communications act was not intended by Congress to include Federal agents engaged in detecting crime and in enforcing the United States Criminal Law.

The case was argued on November 15, 1937, by Mr. Louis Halle and by Mr. Thomas O'Rourke Gallagher for the petitioners and by Mr. William W. Barron for the respondent.

(Continued on page 64)

ALBERT B. HOUGHTON
Member Special Committee on Law Lists

SPECIAL COMMITTEE ON LAW LISTS PREPARES FOR EFFECTIVE ACTION

Soon to Open Office in Connection with Association Headquarters in Chicago for Discharge of Its Administrative Duties—Secretary of Committee to Devote Full Time to the Work—Letters, Form of Application and Questionnaire Have Gone out to Lists and Completed Applications by Those Desiring Committee Approval Must Be in by February 1, 1938—Duties of the Committee, etc.

AT the Association's recent annual meeting in Kansas City final report of the Special Committee on Law Lists, headed by Earle W. Evans, was adopted and the committee discharged. Pursuant to a recommendation contained in this report President Vanderbilt appointed a new Special Committee on Law Lists authorized, empowered and directed to

"(a) procure information regarding Law Lists and from time to time advise members of the Association thereof;

(b) recommend to the Association for adoption from time to time such standards or rules, and amendments thereof, for Law Lists as may seem in the interest of the public;

(c) adopt, and from time to time amend, such reasonable rules and regulations for the conduct of its investigation as it may find desirable;

(d) endeavor to protect the public and members of the profession from dishonest, fraudulent or unworthy conduct of persons who represent, or claim to represent, Law Lists;

(e) cooperate with law enforcement officers and others interested in the censure or punishment of such dishonest, fraudulent or unworthy conduct;

(f) investigate, at the expense of the respective applicants, applications received for the approval, by the Association, of Law Lists;

(g) approve such of the Law Lists as are found, upon such investigation, to have complied with the rules and standards of the Association and the regulations of the Committee, and revoke, conditionally or otherwise, the approval of any such Law List if the committee finds that the issuer thereof has, after approval, violated any of such rules, standards or regulations;

(h) take such action as it may deem advisable to cause the approval, or revocation thereof, of Law Lists to be made known to the members of the Association."

The rules or standards adopted by the Association, and to be observed by this committee, as and for law lists in which lawyers may permit their names and professional cards to appear, are as follows:

"1. Every list of attorneys at law, legal directory or other instrumentality maintained or published primarily for the purpose of circulating or presenting the name or names of any attorney or attorneys at law as probably available for professional employment, shall be deemed a Law List.

"2. The purchase or use of an approved Law List may be recommended to attorneys at law, or laymen, by its issuer, only on the basis of the circulation, physical makeup and accuracy thereof, and the extent to which lawyers listed therein have been investigated. Efforts by the issuer of a Law List to otherwise secure employment for any attorney listed therein, or presented thereby, shall be deemed ground for disapproval, or for the withdrawal of approval.

"3. No Law List shall be approved or continue to be approved

(a) if, in connection with the preparation, publication, distribution or presentation thereof, the issuer does, causes, permits to be done, encourages or participates in the doing of, any act or thing which, directly or indirectly, violates the Canons of Ethics of this Association, or which constitutes the unlawful practice of the law;

(b) which shall be conducted upon a basis which does not tend to promote the public interest, or which employs any practice not in accord with a high standard of business conduct;

(c) or if the price for representation, or listing therein, is not uniform within reasonably prescribed areas, or is exorbitant;

(d) or if any obligation is assumed by either user or attorney, to employ, exclusively or preferentially, in the forwarding, receiving or exchange of legal business, the attorneys listed therein;

(e) or if in the physical makeup thereof, preferential prominence shall be given to the name of any attorney or attorneys listed therein, by different size or character of type, underscoring or other methods employed by printers for emphasis or to attract attention; but the foregoing shall not prohibit the publication in the geographical section of a Law List of such professional card as the Canons permit or of a reference there to such card in another section of the book;

(f) or if the issuer thereof shall endeavor to direct, or control, the professional activities of any attorney listed therein or presented thereby;

(g) or if such Law List shall be published or issued as a part of any professional, commercial, trade or business publication or journal;

(h) or if the issuer thereof shall neglect or refuse to promptly and fully (a) notify the Association in writing of any payment or payments made by such issuer, or by an indemnitor, upon claims of defalcation by a listed attorney, or to (b) cooperate, at the request of the Association, in the investigation, ascertainment and proof of the facts of such claims.

"4. These rules shall be effective as to Law Lists published, circulated or maintained on or after July 1, 1938."

FOUR MEMBERS OF SPECIAL COMMITTEE ON LAW LISTS AND SECRETARY

The present committee is composed of Frank E. Atwood, Chairman, Central Trust Building, Jefferson City, Missouri; Stanley B. Houck, Northwestern Bank Building, Minneapolis, Minnesota; Albert B. Houghton, Caswell Block, Milwaukee, Wisconsin; Robert T. McCracken, 1421 Chestnut Street, Philadelphia, Pennsylvania; and Fred B. H. Spellman, Box 299, Alva, Oklahoma.

This committee has held several meetings and will soon open an office in connection with Association headquarters, 1140 North Dearborn Street, Chicago, Illinois, for the discharge of its administrative duties.

This office will be in charge of Martin J. Teigan, as Secretary to the Committee, who for a number of years has been Secretary of the Commercial Law League of America. Mr. Teigan is an outstanding authority on law lists. His resignation as Secretary of the League will become effective January 15, 1938. Thereafter, his full time will be given to this work of the American Bar Association.

Letter, form of application, questionnaire, etc., have gone out to the law lists, and completed applications by lists desiring committee approval are required to be in by February 1, 1938.

EDITOR'S NOTE: The photograph of Mr. Albert B. Houghton, of Milwaukee, the remaining member of the Special Committee unfortunately could not be secured in time for use in the above layout. It will be found on page 61, opposite the article.

LEGAL ETHICS AND PROFESSIONAL DISCIPLINE

THE need for all-inclusive bar organizations in the various states has been felt by members of the bar for many years. Two methods of accomplishing this result have been used during the period between 1921 and 1937 and now a new method has been employed.

The most widely used method is legislative enactment. In 1921, North Dakota adopted the first State Bar Act. Idaho, Alabama, New Mexico, California, Nevada, Oklahoma, South Dakota, Utah, Mississippi, North Carolina, Arizona, Washington, Louisiana, and Oregon have followed in turn. These statutes have been elaborate and have provided for all the details of a governmental scheme for an all-inclusive bar.

The second plan used has been a combination of legislative act and judicial order. An act of the legislature is passed, setting forth the general objects of the organization and declaring that the supreme court shall have power to adopt rules to effect the organization and government of the bar, which is followed by a court order establishing the all-inclusive organization. This combination plan has been used in Michigan and Kentucky.

As far back as 1932, Mr. Robert Guinther in his presidential address to the Ohio State Bar Association advocated integration by judicial order. This was one of the earliest, if not the very first suggestion of integration by this plan. It has remained for the Supreme Court of Nebraska in In Re Integration of the Nebraska State Bar Association (275 N. W. 265) to provide a complete plan of bar government by judicial order. This action occurred in September of this year, and was taken by the court upon petition of a committee of lawyers representing the Nebraska State Bar Association, which followed a referendum by secret mail vote submitting an order to be made by the Supreme Court integrating the Bar. The petition filed with the Court stated that a large majority of the members of the bar of the state, as well as informed public opinion "favor bar integration by supreme court rule as a means of providing better service to the public by the legal profession, of effectively combating the unauthorized practice of law, and of improving the ethical standards of the profession and giving to it the high public esteem that it should enjoy."

The court discussed the question as to whether it had power to make the order suggested. The constitution of Nebraska confers upon the courts the judicial power, but contains no express grant of power to any of the three departments of government to define and regulate the practice of law. The court concluded, however, that this power naturally belongs to the courts, and constitutes a part of their inherent power. It said: "The judicial power of this court has its origin in the constitution, but when the court came into existence, it came with inherent powers. Such power is the right to protect itself, to enable it to administer justice whether any previous form of remedy has been granted or not. This same power authorizes the making of rules of practice."

The court further said: "The inherent power of this court which petitioners ask us to invoke has always existed. This power is not subject to delegation to committees and representatives, although these agencies may be utilized for investigation or fact-finding purposes and to make recommendations, but the final decision must rest with the court."

It then made this significant statement:

"That the courts and lawyers have been subjected to public criticism is common knowledge. That a few unethical practitioners have degraded the public esteem of the bar as a whole is a fact well known to every lawyer. The denunciation of the bar by the public is based on the belief that the bar could purge itself if it would, but that it does not wish to do so. In the past, reliance has been placed in the bar associations of the state to accomplish effective corrective results. We have overlooked the fact that the bench and bar are so intimately related that the problems of one are the problems of the other. We have come to the conclusion that the bar of itself, can do little to better the situation. But, with a cooperating bench and bar, it appears to us that a more effective and efficient regulation of the bar would be the result. Under the plan suggested by the petitioners, it can be accomplished without invoking any power that this court has not already exercised in the past and without the delegation of any of its judicial functions to any agency of the bar. The matter of the admission, suspension, discipline and disbarment of attorneys still rests in this court, and this court alone. In the event of a failure of the plan to function as hoped, it can be corrected or abandoned by the amendment or revocation of the rule by the court in the exercise of its sound judicial discretion. Most courts in the past have shown a reluctance to act that has contributed to the criticism to which the bar has been subjected. We feel that it is our duty, especially where the request comes from so large a majority of the bar who participated in the referendum on the subject, to consider favorably the adoption of rules providing for the integration of the bar of this state by court rule under the powers lodged in this court by the Constitution of the state."

The court, by judicial order, set up a complete scheme of government, providing for membership, membership dues, officers, meetings, and committees on Legislation, Judiciary, Legal Education, American Citizenship, Cooperation with the American Law Institute, Unauthorized Practice of the Law, and Finance.

It is significant that while the foregoing committees are to be appointed by the president of the state bar, the court's order provided for committees to be appointed by it and directly responsible to it to deal with matters of discipline. The important Article XI which deals with this matter is as follows:

"COMPLAINTS"

"1. The Supreme Court shall appoint a committee in each Judicial District consisting of not fewer than three (3) members, and all complaints of professional misconduct shall be made to the committee in the District where the member complained of resides.

"2. It shall be the duty of a Committee, upon receiving a complaint of professional misconduct on the part of a member, to make an informal and private investigation of the matter; and upon being satisfied that such complaint is without merit, the Committee shall proceed no further, and shall dismiss same.

"3. If, however, a Committee after making said informal investigation, concludes that there is reasonable ground to believe that the member complained of is guilty of an offense which requires and justifies further action, the Committee shall immediately cause the complaint to be reduced to writing, specifying with particularity the facts which constitute the basis of the complaint, and shall serve a copy of said complaint upon the member complained of;

and the member so complained of shall have the right and opportunity to file with the Committee, within twenty (20) days after being served with said copy, any statement, answer, affidavit, or document which he may desire; and said Committee, if it still believes that there is reasonable ground as aforesaid, shall thereupon transmit to the Supreme Court said complaint and the statements, answer, affidavits or documents submitted and filed by the member complained against, together with the Committee's report of investigation. Said Committee shall take final action upon all complaints within ninety (90) days after the same are made. Such complaint shall be made in the name of the State on the relation of the Nebraska State Bar Association.

"4. Upon receipt of any complaint forwarded by such Committee, as aforesaid, the Supreme Court may take such action as to it seems just and proper. It may refer said matter to a Special Master to take evidence of and concerning the same, upon twenty (20) days' notice as to the time and place of hearing given to the member complained of. Said Special Master, if so appointed, shall have the power and authority to administer oaths and affirmations to witnesses, to subpoena witnesses duces tecum, or otherwise; and the said Master shall, upon praecipe filed by the member complained of, subpoena witnesses duces tecum, or otherwise as shall be requested. Said Master shall cause all of the evidence offered and adduced at such hearing to be taken by a reporter and afterwards transcribed to typewriting; and said record, as so made, including all exhibits offered or received, shall be transmitted to the Court with the Special Master's findings and recommendations.

"5. In the event the Court deems it necessary, the Court may appoint any attorney to prosecute such action.

"6. All expense incurred in connection with such hearings shall be borne by the Association, but shall be first allowed and approved by the Supreme Court.

"7. Unless requested by the accused member, neither the hearings, records, or proceedings of the Committee, nor those of the Special Master appointed by the Court, shall be public, nor shall any publicity be given thereto prior to the filing of the report of the Special Master.

"8. In case the Committee aforesaid shall determine that there is no reasonable ground to believe the member complained of guilty of an offense which justifies further action, or in case said Committee fails to act within ninety (90) days after complaint has been made, then the complainant shall have the right to present said matter directly to the Supreme Court by informal complaint filed with the Clerk thereof, supported by affidavits or other prima facie evidence; if probable grounds for disciplinary action appear, such complaint may be referred to the Attorney General for prosecution under the present rules of the Supreme Court, with amendments which may be made thereto. The intention being that the provisions of this article shall be cumulative and not exclusive, but that no complaint shall in any case be filed with the Supreme Court until it shall have first been presented to the proper Committee as herein provided."

The judicial method used in Nebraska is believed to be superior to the legislative method for the following reasons:

(1) It is easier to secure court action than legislative action;

(2) Court rules are more flexible, easier to amend and change in the light of experience in operation than legislative acts; and

(3) The courts are more familiar with the needs and views of the legal profession and more desirous for the improvement of the profession than a legislative body composed of laymen and lawyers.—(16 Nebr. Law Bulletin, 136)

COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES

Legal Rights for News

(*Continued from page 21*)

stories and tend also to lessen the effectiveness of the particular service, to the member or client papers.[24]

Summarization of the problem involved indicates that legal means for the protection of news may be through copyright, trade mark in special cases of a series, and injunction against unfair competition. Copyright protects style and manner of expression and does not therefore seem the best choice of remedy for the protection of day-to-day news releases. Trade mark protection fits more especially into protection of a series of articles or cartoons. Injunction against unfair practices seems the only effective means of remedy, outside of legislative action defining news as impersonal property.

Although the recent case of Associated Press v. KVOS was decided adversely to the press association, the decision was based on procedural grounds, and the substantive law as defined by such cases as International News Service v. Associated Press and Herbert v. Shanley Co. still continues to be valid law, although the interjection of the radio problem brings new elements into the picture; it would seem, however, that deliberate lifting of news collected by newspapers and press associations as instrumentalities of the newspapers would clearly be unfair competition, at least if broadcasting of news is made during the time when the news has commercial value.

In the instant case of the Associated Press v. KVOS, the AP might have filed an amended petition accompanied by proof of damage of $3,000 or more in addition to interest and costs, or it might start action in the courts of the State of Washington.

24. Thayer, Frank. How News May Be Protected by Law. Editor & Publisher. Vol. 70. No. 22. p. 5. May 29, 1937.

(*Continued from page 60*)

Mortgages—Impairment of Contract—Appealable Federal Question

Honeyman v. Hanan, as Executor etc. 82 Adv. Op. 254; 58 Sup. Ct. Rep. 273. [No. 583, decided December 20, 1937.]

Appeal from Supreme Court of New York challenging the validity under the contract clause of the 10th amendment, of §§ 1083-a and 1083-b of the Civil Practice Act of New York which, as interpreted by the State Court, provides that no action to recover a money judgment for any indebtedness secured by a mortgage may be maintained after the mortgaged premises have been sold under a judgment of foreclosure and sale, unless the right to a deficiency judgment has been determined in the foreclosure action. In a prior action to which the appellee here was a party, and which decreed sale of the mortgaged premises, a motion for a deficiency judgment had been denied. This appeal arose in a subsequent action on a collateral bond securing the mortgage.

In a *per curiam* opinion the Court dismissed the appeal on the ground that the question raised was one of the distribution of jurisdiction in the State Court; that this is not a constitutional question; that the question of the validity of the state legislation could have been raised in the foreclosure action and brought to the Supreme Court in accordance with the applicable rules; and that the requirement that the right to a deficiency judgment be determined in the foreclosure action does not raise a substantial federal question.

BASIC CONCEPTS: PERSONS, PROPERTY, RELATIONS

Interests of Personality, Property and Relations Difficult to Keep Distinct—Conflict between Law and Equity Has Added to the Confusion—Equity Has Long Protected Personality and Relational Interests under Guise of Protecting Property—Family Relations, General Social Relations, Political and Professional Relations, Trade Relations Extremely Important in Modern Society—They Demand Protection and Control Unavailable through Law Relating to Personality and Property Interests, etc.*

By Leon Green
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THE common law has developed to a very large degree around the interests of person and property. The early common law actions, for example, were devoted primarily to the protection of these interests against physical harms and appropriation. As they have expanded and as the harms to which they may be subjected have become more subtle, the common law too has expanded and grown more subtle. In the meanwhile, through the action on the case and its successor, the code action on the facts, with the assistance of equitable principles, an entirely new group of interests, namely, the interests a person may have in his *relations with other persons*, has been recognized and given protection. But in a society so active and complex it has been difficult to keep distinct these basic concepts of *personality, property* and *relations*.

The confusion of interests of personality, property and relations is due in part at least to the conflict between law and equity. In the familiar case of *Gee v. Pritchard*[1] (1818) the court restrained the publication of certain personal letters written by plaintiff to defendant; in *Abernethy v. Hutchinson*[2] (1825) the court restrained the publication of certain notes taken of plaintiff's oral lectures. In both of these cases the subject matter involved in one sense could be viewed as nothing more than the emotional or intellectual sparks given off by the personalities of the respective plaintiffs. In another sense the conduct of the defendants could be viewed as an interference with plaintiff's relations with other persons. In no legitimate sense could the interests of the plaintiff be viewed as property. The plaintiffs had done nothing to set aside their creations as property. The casual letters and spoken words found their value in their close connection with the personalities of the respective plaintiffs and in their effect upon the relations existing between plaintiffs and other persons. But the chancellors having limited their jurisdiction to property, found it convenient to so characterize these interests in order to give the plaintiffs the protection they deserved. The holdings have been followed in later and analogous cases, but most courts have been sensible enough to recognize that they were not dealing with property interests.

The development of photography made it possible to appropriate the likeness of a plaintiff's person without his consent. The advent of commercial advertising gave a person's likeness and his name money value. The moving picture industry has made the likeness, name, and personal history as well, of many persons the potential sources of wealth. Before these interests of personality received general recognition, the New York Court of Appeals refused protection to a girl whose likeness was appropriated for use on flour sacks.[3] Happily, the legislature of that state corrected the Court's blunder.[4] Other courts also have refused protection against the appropriation of photographs, names and personal history because they could find no property interest involved. Fortunately, some courts found it possible to spell out a property interest in such cases, and still others found what they conceived to be a new doctrine which they termed a "right of privacy" for the protection of the personality. The California court in a case involving the appropriation for scenario purposes of the lurid personal history of a woman who had since mended her ways, found a solution in the provision of its constitution which guarantees the "right of happiness" to its citizens.[5]

The trouble in these cases was not with the law; it was with the lawyers. No appeal to the protection afforded property was necessary. In common law jurisdictions a *free person* has always been protected against both physical harms and the appropriation of his personality. There is no better settled principle of the common law. That does not mean that even an interest of personality may not have to give way when larger interests are involved, as, for example, the attributes of likeness, name and personal history may have to give way to the public's interest in news and in the facts concerning its public men. But it does mean that the personality is inviolable against any attempt to make commerce of its attributes. When such is attempted, whether by appropriation of physical body, name, likeness, personal history, or by an invasion of privacy, both common law and equity should be and are in most jurisdictions at hand with appropriate remedies.

When the aeroplane came along, the landowner challenged the flyers' use of the space above his land. This challenge would never have been made had lawyers recognized that one of the earliest and most sacred rights of human beings is the freedom to be active, to "go places and do things."[6] This freedom antedates

*Address delivered at the annual dinner of the Section of Real Property, Probate and Trust Law, at Kansas City, Mo., on Sept. 28.

1. 2 Swans. 403.
2. 3 L. J. Ch. 209, Hall & T. W. 28.
3. Roberson v. Rochester Folding Box Company (1902) 171 N. Y. 538, 64 N. E. 442.
4. (1909) N. Y. Civil Rights Laws, §50, 51.
5. Melvin v. Reid (Ca. D. C. A. 1931), 297 Pac. 91. For general discussion see my article "The Right of Privacy" (1932), 27 Ill. Law Rev. 237.
6. Comment, Flight of Air Craft—Right of Privilege (1935), 6 Jr. Air Law, 201.

land ownership by thousands of years. For example, it is one of the privileges that no state under the Constitution can deny a citizen of the United States.[7] In fact, in order that there may be ownership of the surface, provision for ways of travel must be made, and governments which have claimed and disposed of the public domain have always so recognized. When this new power of aviation became available to men and added unlimited range to their activities and general freedom of personality, all that the landowner could have possibly expected was that the use, enjoyment and integrity of his land and improvements should have protection against unnecessary and unreasonable hazards imposed by those who exercise their right of flight. And so the courts are slowly concluding.[8]

Lately we hear much of the right to contract, the right to work, the right to a job, all as property interests. The exercise of the capacity to be active in society, to render service, to contract and enter relations with other persons are distinctly rights of personality. Those who would contend that such rights are property interests have forgotten their landmarks. Property itself in its inception was but the projection of the personality.[9] Nothing is more sacred than the person, and the common law needs no appeal to property in order to give the person protection in his fundamental rights. But of necessity these rights of personality are subject to equal or superior rights in other persons as are all other rights known to the law.

In an expanding society it was but natural that the concept of property should come to include many interests other than the simple chattels and landowner interests to which the term was first applied.[10] Today it legitimately includes every form of movable thing which men possess and to which value is attached. Moreover, it includes every type of interest, corporeal and incorporeal, into which men have divided and classified land. In addition, in our own time we have seen the concept expanded to include numerous symbolical things, as, for example, metal and paper money, bills and notes, bonds and mortgages, and all the complex forms of commercial paper, warehouse receipts, bills of lading, and other documents which in final analysis do represent physical things of one kind or another. The concept is not a new one. It was the basis of the duty under the common law debt to hand over some tangible physical thing held by the debtor for the owner. This symbolism is as legitimate expansion of the term property as is the expansion of personality to include the clothing and personal adornments identified with the person, his likeness, or the incidents of his personal history. The property concept is broad enough and valuable enough without expansion beyond these limits.

On a parity with both the interests of personality and property are those of relations with other persons—relational interests. When, for example, Jones and Smith by agreement combine their efforts in an enterprise, there is something here identified as a relation brought into existence in addition to the two personalities. That relation incidentally gives each personality power and range beyond that of either. If in their enterprise they combine the resources of lands, chattels and money, they too are bound by the newly created relation. It is as distinct from their persons and property as the latter are distinct from each other. So is the protection that is required for it.

Relational interests are not new to the law. They have long been a very important element in the legal order. But they have never been clearly identified, and the value of the concept and its ramifications have never been appreciated. Relational interests are not infrequently called property interests, and much of the protection which has been extended them by law has been under the guise of protecting property. This, in addition to the long standing conflict between courts of law and equity, has also doubtless been due to the desire to bring them within the peculiar sanctity extended to property under the due process clause and other clauses of our national and state constitutions. But it should not be necessary to invoke the protection of property for these interests. They are entitled to protection for their own sake, for the relational interests of present day society in their aggregate are perhaps as valuable as the aggregate of physical property. Some of them are modern society's substitute for property. They give to property much of its value, and add immeasurably to the power which personalities possess. They demand for their control and protection the projection of law far beyond that required for either person or property.

There are several groups of these relations which are easily recognized. First is the broad group of *family relations;* second, *trade relations,* made up of employment relations on the one hand and general commercial relations on the other; third, *political and professional relations,* yet largely in their formative state; and fourth, *general social relations.*

What are the characteristics of these relations that set them off from the interests of personality and property? Generally, they do not have the attributes of physical things. Their value lies in the fact that one person has an interest in the welfare and conduct of some other person. Normally, hurts to such an interest do not involve physical hurt to the person who has the interest, or to his property, and when they do so result little protection is extended against them. For example, a person may be defamed. The charges against him may react on his physical health, but few courts have allowed any protection for this hurt to the personality. The defamatory hurt is to his standing in the eyes of his business associates, his neighbors, or people generally. His social, family, professional, business, or political relations, or perhaps all of them, may be hurt by such defamatory charges, and it is against such hurts that protection is given. As another example, the title to a person's property is slandered. The loss of its sale may seriously impair his fortune. His property itself is not hurt, but he may have recovery for the hurt done his relation with a particular buyer or to his relation with buyers in general. As a further example, plaintiff may have a contract as the representative of an industry to market its products in a certain locality. A third person induces the industry to breach the contract. Plaintiff suffers no hurt to person or property for which he is given any protection against the third person but for the hurt done his relation which has been destroyed or appropriated he may have recovery against such person.

It will also be noticed that the relations as between the parties themselves are not treated as things. They are not subject to assignment to other persons without consent of the parties, as is true with reference to property, and where there is a substitution of parties a new relation is created. Physical property can be sold and conveyed. Symbolic property, such as a note or

7. U. S. Const. Art. IV, §2, XIV Amend.; Crandall v. Nevada, 73 U. S. 35 (1868).

8. Hinman v. Pac. Air Transport, 84 Fed. (2d) 755 (1936); Comment, Trespass by Airplane (1936), 31 Ill. Law Rev. 499, (1936) 7 Jr. Air Law, 624.

9. Hamilton, "Property—According to Locke" (1932), 41 Yale L. J. 864; Larkin (1930) Property in the 18th Century.

10. See Comment (1935), 4 Fordham Law Rev., 307.

debt or claim to money accrued or to accrue, or in fact any product that may result from a relation, may be sold or assigned, *but not the relation itself.*

But it is not the concept of the relational interest *as between the parties to the relation* with which we are concerned in this discussion. It is the relation as it may interfere with or in turn be interfered with by third parties. It is in this particular that relations differ so widely from person and property. *What protection is there to such interests as against the hurts done by third parties? What immunities have those who have such relations against the hurts which they incidentally cause third persons?* These inquiries do not involve the simple two-party situations found in the protection of person and property. They are always three-party situations; a relation which necessarily implies two persons, and a third party who interferes with that relation. It is thus that relational interests demand such different treatment in the protection given under the law.

Let us briefly consider the more important relations. In the group of *family relations,*[11] actions for alienation of affections, criminal conversation, seduction and abduction, physical injury to children, parents and spouses, the wrongful death of some member of a family, failure to deliver death messages and other conduct interfering with the relations between living members of a family and a deceased member, interference with the relations enjoyed by beneficiaries under wills and insurance policies, defamation of one of the spouses, and other like cases, are all the product of the recognition given by law to the interest of one member of the family. Except in rare instances, these interests have not been identified as property interests. They transcend any notion of property. The actions for their protection are relatively new actions and are still little better understood by lawyers than by laymen. Some of them are treated as anomalies, and no one of them has reached a maturity of development.

General social relations[12] have recognition of long standing. These relations have none of the earmarks of either personality or property. They give substance to the thing we call *reputation.* They have not infrequently been thought of as interests of personality, but a person's standing in the eyes of his neighbors, his friends and other people generally is very definitely a relational interest. Their value in some instances has been so great that very able lawyers have been tempted to call them property. But courts of equity in this country have withstood all attempts to invoke their protection in behalf of such relations. Social relations, as is true of other relations, are protected by a very distinctive type of common law known as libel and slander. Practically speaking, they have no other protection. Protection to them, like the protection given the relations of the family group, is relatively new and immature. For several centuries both groups of relations were protected, if at all, by the ecclesiastical courts.

Of growing importance are *political and professional relations.*[13] With the development of democratic society and numerous professional groups, the relational interests created thereby have demanded recognition and protection. The right to vote is one of the earliest political relations to be recognized. It is still relatively young, and the protection afforded it is still inadequate. The protection extended to this group of relations is through the recognition given the common interests of the members of a group. The members of groups of all types—political, professional and otherwise—require freedom of action and communication within the group in order to make the group effective. The recognition of these privileges has given rise to important immunities for the hurts done both outsiders and other members of the group. The recognition of a common interest in the political group, for example, gives a wide immunity to public officials in the performance of their official functions. In the case of judges, legislators, and high executives, immunity for all practical purposes is complete, while in the case of lesser officials it may be quite limited. With respect to non-official groups the immunity is always limited. As an antidote, however, to these privileges and immunities, corresponding privileges and immunities are given critics, who also represent the interests of the public. The idea involved is strikingly similar to the adage that fleas are good for dogs. Public officials, teachers, lawyers, medical men, dramatic and other artists, and in fact all those who touch the public's interests, are legitimate prey of the critic—reporter, columnist, and publisher. Here is involved the difficult subject of freedom of speech and press—the public forum, the newspaper, periodical, radio, and other forms of publication. The protection given relations and interests subject to hurts inflicted through such activities is as yet poorly defined. The interests involved have none of the attributes of property except that they are valuable. They call for peculiar treatment by courts as well as other agencies of government.

But of transcendent importance among relational interests are the *relations of trade*[14] around which is built the structure of our modern order. Trade relations for the most part are based upon express contract, but not entirely so. For example, the relational interests of a business may rest largely in contract, but they may also rest in its good will which is found in the potentialities of future dealings. Likewise, labor relations may rest upon contract, but the great bulk of such relations rests fundamentally upon the needs and customs of industry rather than upon formal contract.

The early common law lawyer did not think of trade relations as property. There are very few instances of their protection even against violent physical harms until the late 1800's. While they have been given protection against defamatory hurts, the strict requirements for showing special damages in absence of an attack upon the character of the trader himself, has made such protection very limited. Many courts will still refuse equitable relief against such hurts unless they are carefully disguised by the pleader. An early Statute of Laborers gave emergency protection to employers, presumably in behalf of the general welfare. But it was not until *Lumley v. Gye*[15] (1853) that any real recognition and adequate protection of trade relations against interference by persons not parties to them was made possible by the courts. In fact, it was thirty years later in *Bowen v. Hall*[16] before the doctrine of *Lumley v. Gye* struck the profession as of any great significance, and only in our own day has it been given recognition over the whole field of trade and commerce. Some courts have not been content to leave the doctrine in its original simplicity. They have attempted to transform the contract relation into property. If it be assumed that a contract relation is property, then upon that premise it is easy to argue that the opportunity to

11. Relational Interests (1934), 29 Ill. Law Review, 460.
12. Relational Interests (1936), 31 Ill. Law Review, 35.
13. Relational Interests (1935), 30 Ill. Law Review, 314.
14. Relational Interests (1935), 29 Ill. Law Review, 491, 30 Ill. Law Review, 1.
15. 2 E. & B. 216.
16. L. R. 6 Q. B. 333 (C. A. 1881).

enter into contracts is also property. Through this alchemy the "right to work," the "right to a job," and other such incidents of the interests of personality are sought to be transmuted into property. These so-called rights merit a more thorough analysis than can be given here. They have a great appeal. Suffice it to say that whatever substance they have will find its protection in the law of relational interests rather than in the law of property.

No process of transmuting, glossing, rationalization, or legerdemain for invoking the law's recognition of trade relations is required. They have developed and become important because trade is essential to the modern economic and social order. Trade relations are not dissimilar to the other inventions and discoveries of modern society. No one would think it necessary to identify electricity as coal or oil or water power. It is distinct from these other forms of power and we deal with it differently. It is not in conflict with them. It adds greatly to their utility and is given greater scope by their availability. Likewise are relational interests with respect to property interests. The two are not in conflict. They are mutually interdependent, as are also the interests of personality. Society has advanced beyond the stage of single personalities and physical property forms; group activities call for something more than barter and sale and even symbolic exchange of property. The answer has been found in the development of relations, and they have given a range to business activities far beyond the range that property could have ever given. They have the advantage of property in their capacity for multiplication and adaptability, as witness the corporate form of organization. They are a distinct form of wealth, and to call them property is to confuse them with other forms of wealth. They require treatment different from that required by property on the part of the people who are dependent upon them, and on the part of the courts and other agencies of government. They are a new type of interest. They tie together modern society and make it possible to utilize the natural resources of property and invention to the end that there may be more activities and a better balanced existence for a constantly growing population. It is the press of these almost infinite relations which is making so many new problems for government and for the legal profession. They can not be subjected to the principles, rules and formulas which have been developed for person and property. They demand treatment peculiar to themselves.

There are many difficult problems in the field of trade relations. Among them are those that arise out of the relations between the owners and managers of industry and those who operate its physical processes. Enormously complex industrial relations are over-simplified by the terms capital and labor, or employer and employee. Having so simplified them, we expect the property law of land and chattels and the tort law of master and servant to work the legal adjustments of their conflicts. When they fail, we think that government has failed. And it has, because the law invoked was not designed for any such usage.

It will be recalled that for the greater part of the nineteenth century lawyers struggled to adjust the problems incident to the development of the corporation —itself a structure of relational interests between stockholders, directors, bondholders, officers, managers, et al —by resort to the law of contracts, agency and property antedating the corporate form of existence. Eventually lawyers came to understand that the corporate enterprise required more adaptable legal devices. Legislatures and courts have thus made volumes of general corporation law and still more volumes designed specifically for peculiar types of corporations. In addition, the legislatures have provided bankruptcy, liquidation, and reorganization processes, and for some forms of corporate enterprise have set up administrative boards and commissions. What basis is there for thinking that the complex institutions of modern industry call for less intelligence and less patience?

Industry is dependent on numerous corporate groups for its management, finance, plants, materials, and marketing. For its operatives, industry is dependent upon a different type of organization, immature in development and difficult of control. Industry is the common product of these discordant groups. In it they have a common interest. The three—corporate group, labor union and industry—are interdependent. Their relations are complex. How shall their conflicts be adjusted?

The police, with their childish prejudices and lack of understanding, have no part to play in such matters except when life and property are in jeopardy and then only under the direction of someone who is not ignorant of the interests and obligations of all the parties concerned. Nor have the courts been given the jurisdiction to adjudicate the conflicts of these relations. Their power to adjust labor disputes is always incidental to something else—incidental to the keeping of the peace, protection of person and property against violence and fraud, or protection against interference with other trade relations. After a century of struggle the limitations upon the means either group can employ to further its ends are by no means definitely outlined. In this mass struggle for economic freedom, we still suffer from ill-timed intrusions of both police and courts. It is no answer that both groups seek to exploit industry; that they are ruthless and excessive in the prosecution or defense of their causes. It is no answer that each group has grasped political power; or that they are entitled to resort to self-help in defense of their relations so long as government refuses to provide means for adjusting their conflicts. Nor is it any answer that their relations are the basis of their profits and livelihoods as much as are goods for the merchant or lands for the farmer. The point is, shall we who are not allied with either group stand by impotently while their struggles disrupt and imperil the social order? Shall we as a profession trained in the art of government dally with the concepts and processes of law designed for other problems and refuse to fashion instrumentalities adequate to bring these extremely important relations under the control of government?

We have made a beginning too long delayed in the Norris-LaGuardia Act, the Railway Labor Act and the Wagner Act. Although it may take years of painstaking efforts to mold new processes into workable law, when that is done there should be no place left for strikes, pickets, boycotts, sit-downs, lockouts, company unions, detectives, bribery, bombs, rackets, machine guns or the other weapons which have been utilized in the industrial struggle. Government has a definite place in providing adequate protection for the relations of both the capital and labor groups. Instead of constituting the explosion points of the social order, as at present, they should become its most conservative and stabilizing influences.

What is true of industrial relations is true in part of the relations of other classes of traders. The protection and control of those intricate institutions of finance—banks, holding companies, investment and personal trusts, insurance companies—their relations inter sese, as well as their relations with their cus-

tomers, investors, borrowers, beneficiaries, require law far different from that which concerns chattels and lands. The protection and control of those who produce wealth from agriculture, mines and natural resources of other types with respect to their relations with each other and their relations with their processors and dealers, also demand many new legal forms. The same is true as to those general traders who market, or supply the facilities for marketing the products of industry, invention, agriculture, and mines. The methods of cooperation and competition between these groups, which government will approve, are as yet but dimly outlined. All of these and other trade relations have multiplied so rapidly and ramify so infinitely that they are leagues beyond the articulated principles, formulas and rules of law we knew even twenty years ago. This revolution in trade itself is necessarily followed by a corresponding revolution in the law of trade.

It is worthy of emphasis that wealth based so largely upon intricate relations is a precarious and delicate type of wealth. It does not have the enduring qualities of physical property. If it can be easily developed, it can also be easily destroyed. In times of crises such as the recent depression, for example, it is the relational interests which wither so quickly and suffer such great losses. The reduction of the national income from eighty billions of dollars per year to less than forty billions resulted from the shrinking of credits based largely upon such interests. In times of excessive prosperity it is likewise the relational interests which multiply so rapidly and get out of control so easily. The same processes which are adequate for the control and protection of property are unfitted for dealing with this form of wealth. For example, consider the matter of taxation. The ad valorem basis of taxation is difficult and perhaps unjust as applied to personal and real property. As applied to relational interests it is so difficult and unjust as to have no place at all. In order to reach those interests entirely new methods must be devised. The complex scheme of income taxation is primarily designed for such purpose though it reaches the income from property also. License taxes, sale taxes, and excise taxes in general, together with estate and inheritance taxes are in final analysis levied upon relational interests. The recent adventure in the field of social security lays its burden there too. There is no better thermometer by which to gauge the wealth represented by these interests than by the attitude practical government, hard put for revenue, has taken toward them in recent years.

Consider also the matter of fair competition among traders, the protection of consumers against inferior qualities and excessive prices, the regulation of the issuance and sale of securities, the security of unemployed and aged persons, the control of public service companies and other such group interests. The protection the interests here involved require is equally as difficult to provide as is their control. Trade relations present exacting problems for government. Given free reign traders take over government; given unintelligent government, the trade upon which all of us are so dependent may be greatly impaired if not destroyed.

Beginning about half a century ago, government began to do the only thing within its power to meet the demands made upon it by the relations growing out of trade. It fell back upon the administrative agency, the first line defense of Anglo-American government. The list of important national agencies roughly represents the relational interests of trade which I have enumerated: The Federal Reserve Bank, The Interstate Commerce Commission, the Federal Trade Commission, The Securities and Exchange Commission, The National Labor Relations Board, The Boards provided by the Railway Labor Act, The Federal Communications Commission, The Board of Tax Appeals, The Social Security Board, and the more important bureaus of the departments of agriculture and commerce. Many of their counterparts are found in the states.

That satisfactory processes for dealing with trade interests will be developed no one who is familiar with the short experience of the Interstate Commerce Commission and the Board of Tax Appeals can doubt. The violent period which culminated in the Federal Constitution and the wholesale making of new law accompanying the setting up of the federal government, should be reassuring to those who fear the readjustments of the moment. Law can only be made through excessive and endless struggle. It has never been made otherwise. The struggle for a rational court procedure covered hundreds of years. The struggles to develop a reliable law of contracts, negotiable instruments, trusts, and insurance, to evolve an equitable oil and gas lease, and every other important phase of our common and statutory law have been long and hard fought. Moreover, among the opposition to these developments have always been many of the best lawyers of the period. No one should think that opposition without value. One of the profession's chief functions is to fight rear guard actions until law can reestablish its broken lines. The supremacy of law comes only when a problem has been brought under control, that is, processes have been evolved to control and protect those whose activities create the problem. As soon as that stage is reached, strangely enough, the need for law has largely passed, opposition recedes, habits, customs, procedures, find their channels. We then focus our protests and doubts as to the validity of governmental processes at some other point where our interests are not yet under control and are yet without protection. It may be taken for granted that control and protection of the interests in a society of groups is immeasurably more difficult than in a society where the individual and his property played the major rôles.

In conclusion, may I add that the most beautiful quality of law is that it is never finished. As long as human beings are inventive enough to create new forms of wealth and develop new activities, there will be constant necessity for adjusting them to the current order. There are always those who will refuse to recognize intruding legal principles, much as the older members of a club accept its new members with ill grace, or as the established wealthy resent the newly rich, or as classical intellectuals lift an eyebrow at recent pretenders. As the new club member must assume meekness, as the newly rich must go in for culture, and as the recent intellectual must bow down to learning, if recognition is to be readily won, so any new legal interest or new legal principle must disguise itself in an old form before the legal profession will give it recognition. That may be why those who have sought protection for relational interests have done so in the name of property. And that too may be why the courts, in giving them protection, have sometimes called them property. After all, why should we expect law and lawyers to be different from other institutions and other people? But why should the law and lawyers continue to ignore what has become so great a part of everyday life?

CHANGING CONCEPTS OF PROPERTY

Evidence of Changes in View as to the Nature of Property Visible on All Sides—Short Review of the Development of Property Laws—Encroachments on the Absolute Ownership of Property—Since This Theory Does not Appear to Be the Prevailing One, the Most Feasible Concept at Present Seems to Be That Social Requirements Are Imposed on the Owner by the State—The Law Should Be Alert to Recognize New Demands and to Devise and Adopt New Rules and Standards*

By Nathan William MacChesney
Chairman of Section of Real Property, Probate and Trust Law

WE see on all sides of us evidence of a change in the nature of property. In 1912, Mr. Justice Brandeis, who was then a practicing attorney in Boston, delivered an address under the auspices of the Chicago Bar Association on "The Living Law." His theory was that the law did not take its proper place in the life of the country, as it does not keep abreast of changing conditions and problems presented by rapid development. The law should be alert to recognize new demands and willing to devise and adopt new rules and standards. In order to illustrate the changing conception of property, it might be well to review in a short space the development of property law.

Dean Bigelow, in his "Introduction to the Law of Real Property" takes as a starting point the Norman Conquest of England in 1066. He also says that "Private ownership of land was to a considerable degree recognized in England in Anglo-Saxon times. . . . It must always be borne in mind that the whole history of the law of real property is one of slow growth, of gradual evolutionary change. . . . In the legal theory . . . in the eleventh and twelfth centuries, the effect of the Conquest was to vest in William The Conqueror a title to all lands in England."

The physical occupation of the soil may not have been disturbed by the Conquest, however. So much land was acquired by the Norman King of England, that it was impossible to keep it all in his personal possession. Large tracts were given out among the immediate personal followers of the King on condition that certain services would be given the King in return. In addition, small land owners required protection from some more powerful individual. By 1175, English land holding was analogous to a pyramid with the king, according to legal theory, as the owner of all English land, at the top. Under him were the great lords, holding large tracts, who were known as *tenants in capite*. *Mesne tenants* were under the *tenants in capite*. The tenants in actual occupation of the land were at the bottom of the pyramid.

At this time, tenants could probably alienate their lands. With the growth of society in England, the necessity for the feudal incidents disappeared, being abolished by statutes in 1656 and 1660. According to the English law today, theoretically, land is held in tenure under the Sovereign; but in the United States, land is held of the State. Tiedeman, in "The American Law of Real Property," states that the term real property included lands, tenements and hereditaments. "Land is the soil of the earth, and includes everything erected upon its surface, or which is buried beneath it. It extends in theory indefinitely upward and downward, *usque ad coelum usque ad orcum.*"

Theories as to the origin of private property have been discussed in the Journal of the American Institute of Real Estate Appraisers, by Francis E. Jones, a Hartford, Connecticut, attorney. He says:

"Occupancy is pre-eminently interesting because of its importance in speculative jurisprudence in furnishing a supposed explanation of the origin of private property. It was once universally believed that the proceeding implied in occupancy was identical with the process by which the earth and its fruits, which were at first in common, became the alleged property of individuals. Blackstone wrote: 'The ground was in common, and no part was the permanent property of any man in particular; yet whoever was in the occupation of any determined spot of it, for rest, for shade, or the like, acquired for the time a sort of ownership. When mankind increased in number, it became necessary to entertain conceptions of more permanent dominion, and to appropriate to individuals, not only the immediate use, but the very substance of the thing to be used.'"

Continuing with reference to this matter, Mr. Jones says: ". . . Sir Henry Sumner Maine . . . considers that . . . joint ownership, and not separate ownership, is the really archaic institution, and that the forms of property which will afford instruction will be those which are associated with the rights of families and of groups of kindred."

This is considered to be the first stage in the concept of property which appears to be going through a cycle. Two parts of this stage have been noticed. The first was absolute ownership of the property by the King or the head of the State. Next, the King granted the property to his agents on certain conditions. The laboring people, during this time, may be classed as serfs. The highest point in the cycle for the individual was probably reached when the absolute title to the property was thought to be vested in the individual, who could use it as he saw fit, subject to the claims of others who were injured by such use. In the business world, at this time, we also find rugged individualism which developed under the doctrine of *laissez-faire* as illustrated, in part at least, by Adam Smith's work on "The Wealth of Nations." Chief Justice Marshall

*Address delivered at the annual dinner of the Section of Real Property, Probate and Trust Law, at Kansas City, Mo., Sept. 28.

conceived that governmental action should be permitted to affect private rights in only a restricted area, which reflected the dominant view of his generation.

The trend of thought at this time was chiefly preoccupied with guaranteeing property rights. However, the popularity of the decision by the same judge in *Gibbons* vs. *Ogden,* 22 U. S. 1 (1824), was because it struck down a monopoly, the implied prohibition of the commerce clause being used to limit the State Legislatures. Before 1828, the Government had been the exclusive property of the upper class, but when Jackson became President, it was hoped that the government would be used to break centralized power.

The vociferous masses of Jackson's followers demanded that property rights should not be untrammelled. During the time that Taney was Chief Justice, very profound technological and business changes occurred in the life of the nation. At this time the legislators began to be concerned with social problems. Taney thought that the restraining of privilege was a proper governmental function. So we find him saying in *Charles River Bridge* vs. *Warren Bridge,* 36 U. S. 420, 548 (1837), "While the rights of private property are sacredly guarded, we must not forget that the community also has rights and that the happiness and well-being of every citizen depends on their faithful preservation." See *Acheson*: "Roger Brooke Taney: Notes on Judicial Self Restraint" (1937), 31 Ill. Law Review 705.

The third phase for the property owner occurs when property will be owned subject to regulation by the State for the benefit of other individuals. The prejudice against monopoly, which we have seen in connection with the case of *Gibbons* vs. *Ogden,* reappeared in the form of the Sherman Anti-Trust Act, and later acts upon the same subject which have followed it, one of the last developments along this line being the Fair Trade Act, which was upheld in *Old Dearborn Distributing Co.* vs. *Seagram-Distillers Corporation,* 57 Sup. Ct. 139 (1936), noted in 31 Ill. Law Rev. 793 (1937).

The final phase would be ownership only for the purpose of satisfying the social obligations of the property owner toward others in society. In this way, anyone who is not a property owner could determine the manner in which the owner was to conduct his business or hold his property. If this hypothesis is correct, a new serfdom, not of occupation but of locality may be on its way.

As an illustration of the encroachments which have been made upon the absolute ownership of property, the proposal of Henry George may be cited. He wished to appropriate economic rent to public use by a tax levied on the value of land exclusive of improvements. By this means, it was thought that all taxes which fall upon industry and thrift could be abolished. This would be an aid to business men without aiding the owner of real property. He wished to sweep away all interferences with the production and distribution of wealth, resorting to state control if competition were impossible. All increases in value that were due to general growth and improvement were to be appropriated for the use of the community. His book on "Progress and Poverty" should be consulted.

Another limitation on the rights of the owner toward his property is illustrated by modifications in the law of landlord and tenant which are occurring in European countries since 1920. The social right of a family to a dwelling is being recognized. This means that the owners of buildings are being more restricted in the manner of evictions and rents that may be charged. If this trend continues, the State would have to provide houses for all of the masses. Again, as a limitation on the theory that a property owner is entitled to the air over his land, it has been stated that this only means ". . . that no one can acquire a right to the space above him that will limit him in whatever use he can make of it as a part of his enjoyment of the land": *Hinman* vs. *Pacific Air Transport,* 84 F. (2d) 755 (C.C.A. 9th, 1936), which case held that flying above the surface of land against the land owner's consent is not a trespass, but is lawful unless it results in injury to the owner in the use, value, benefit or enjoyment of his land. See, *Green* "Trespass by Airplane," 31 Ill. Law Rev. 499 (1936). On this matter of who is entitled to the use of air over land, ownership, it would appear, is a concept to be employed when the interest of the land owner is being appropriated. An aviator does not try to secure any interest in the property, but merely increases the possibility of physical harm to it, said Dean *Green* in "Flight of Aircraft—Right or Privilege," 6 Jour. of Air Law 201 (1935).

In Illinois, for many years, real property has been the principal source of revenue to the state. The personal property tax has been impossible to collect. See, *Altman*: "The Role of the Courts, in Personal Property Tax Cases," 32 Ill. Law Rev. 171 (1937). An attempt to pass an income tax law was unsuccessful so that resort was had to the sales tax for revenue. When it was found that insufficient funds would be derived from the sales tax, the tax on real property was again increased although realty taxes had been reduced for a while as the result of the depression and the activity of particular organizations, which were working toward a definite limitation of the tax rate. The high real property tax on Illinois property is considered as one of the factors which prevents any decided improvement in the real estate market there. Finding that collections of real estate taxes were very slow, the Illinois Legislature passed a law, known as the Skarda Act, which allows the Court to appoint a Receiver for improved real estate on which the taxes are badly delinquent. The receiver takes whatever income there may be from the property to satisfy the tax lien on it. If there is no income, the owner being in possession of the premises, the receiver requires the owner to pay a certain amount which is applied against the taxes.

Recently, a town in Illinois has stated that $4,000,000 in taxes which have been owing since 1928 would be collected by means of the Skarda Act, and by cooperation with the Probate Court, when the property owner had already died. The Probate Court may be of assistance also in collecting delinquent personal property taxes against the estates of decedents. One County made a study of decedents' estates to determine the assessment for personal property taxes. In one case, the value of the estate is said to be $100,000, although the assessment was only $4,000.

It will be seen that although property ownership may be considered to be absolute, it is subject to considerable demands from the State. The revenue derived from these various sources is used by the government in meeting social obligations such as unemployment relief and pensions for those persons who are too old to work. Furthermore regulation of business occurs continually. The Securities Law of the Federal Government was a result of the various State Blue Sky Laws. The mortgage loan business was attempted to be relieved by the Federal Government, which has also started producing electric power by using the energy

from dammed water. It can safely be said that these are encroachments upon the rights of the individual who owns property or a business.

Former President Herbert C. Hoover, in a recent article, "The Crisis of Political Parties," (160 Atlantic Monthly, 257—Sept. 1937) has posed the question in this manner: "Shall centralized personal government undertake to plan the lives of upright men and coerce and compel them to comply? . . . America needs a new and flaming declaration of the rights and responsibilities of free men."

A further example of the encroachments being made upon the rights of certain people is the "sit-down strike." The strikers have claimed that they have a property interest in their employment. One writer has found that the trade relational interest is claiming an ever increasing protection on the part of government. *Green:* "Relational Interests," 30 Ill. Law Rev. 45 (1935). He also states that many of the important problems which arise in dealing with family, trade, professional, political and social relations have been confused with those arising out of the interest of personality and property: 31 Ill. Law Rev. 56 (1936). The interest of the laborer in the employment relation is receiving increasing recognition as is evidenced by the National Labor Relations Act. However, Courts have refused to allow the claim that the worker has an intangible property right to security in his place of work but have not evicted sit-down strikers who had been in possession of their employers' property for 134 days: See, 31 Ill. Law Rev. 942 (1937).

Such strikes are very costly both to the employer and the employee, not only in wages, but also because of the trade that is lost. One solution suggested has been that equitable relief might be denied to the employer unless he should do equity by meeting some of the demands of the strikers.

An interesting suggestion which has been made with reference to solving the conflicts of interest presented by these phenomena is that the persons engaged in the dispute should be willing to yield more easily and more gracefully. This was stated in an address by Dean G. Acheson before the Law Club of Chicago on January 22, 1937, under the title of "Some Social Factors in Legal Change." Mr. Acheson states that new interests in property are demanding recognition. It is my opinion that the proper concept of property ownership should be that the individual owning it should be entitled to hold it and be protected by the State in that right subject to the demands of the Government on behalf of those persons who may be considered under privileged.

For the solution of problems in the field of labor relations, it has been suggested that a branch of the law be developed which would be analogous to the law merchant. In this way, there would be developed some precedent for settling questions which give so much trouble at the present time. One reason for the success of "sit-down strikes," in the last year, was said to be the inertness of people in opposition. Justice Brandeis' observation that ". . . the greatest menace to freedom is an inert people" would appear to be pertinent here. It is felt that an aroused public opinion would have defeated or, at least, curbed the effectiveness of these strikes. It finally did have that precise effect but not until heavy losses in money and some lives had occurred. The processes of the law are ill-adapted to deal with them. It is a contradiction in terms to speak of a mandatory injunction but that was one method which was proposed as a remedy.

The effectiveness of this weapon as used by labor may be attributed in part to the novelty of the situation. On the other hand, some effective method of dealing with the disputes should have been developed. During the world war, it will be remembered that considerable difficulty with labor was experienced. Newton D. Baker, who was Secretary of War at that time, and a great one, approached the problem with a good deal of liberality. He is credited with the following observation: Wages and hours can be compromised if the margin of profit will permit it. Questions of morals, lawlessness or arbitrariness should not be compromised, however, as industrial liberty must rest upon a solid foundation of law. "Disregard the law . . . and you have anarchy. The plea of labor unions for immunity . . . is as fallacious as the plea of the lynchers." From this, it clearly appears that the "sit-down" strike is not a legal measure for obtaining the desired objectives.

One point may be said to emerge from the industrial strife of the past year. It was impressed upon us that the employees, although they are not owners in the technical sense of that word, still have such an interest, arising out of their contract of employment, as will entitle them to consideration in making future plans for business. Mr. Acheson has listed similar interests of non-owners which should be observed:

1. Stability in the production of goods.
2. The use of wealth to produce and distribute goods in quantity at low cost.
3. The protection of the young in entering industry and obtaining employment.
4. The protection of people in attaining dignity and use of their powers through their jobs.
5. Protection against arbitrary dismissal.
6. Security from unemployment, sickness, accident, old age and death.

The primary function of business to increase volume and quality of goods while decreasing the cost has been joined by another major objective, according to a statement by Ernest T. Weir in December 1936, which is to solve the problem of unemployment. Colby M. Chester, the president of the National Association of Manufacturers, has phrased it a little differently by saying that "the outstanding obligations of industry are . . . responsibility for the national welfare . . . and the successful operation of private business."

When individuals are unable to solve their problems satisfactorily it becomes necessary for the Government to step in and do it for them. The National Labor Relations Board has been mentioned. In the field of mortgages, there is the Frazier-Lemke Act and the Minnesota Mortgage Moratorium statute, which was upheld in the *Blaisdell* case. A further variation in ideas of property occurred as a result of the Gold Clause decisions. It is conceivable that interferences such as these with matters which were formerly thought of as private contracts could go so far that anyone who was not an owner would be entitled to use the property to which another person was supposed to have title. This stage would represent a form of Communism or Socialism where the interests of the individual would not be recognized except as they benefited all of the individuals in society. Another form which this development might take is a dictatorship where the disposal of the property is in the hands of one person. The disadvantages of such a situation are apparent from a brief consideration of it.

Since the theory of absolute ownership does not appear to be the prevailing one, at the present time, the concept which seems to be most feasible is that the

social requirements are imposed on the property-owner by the State. In this respect, such social obligations may be analogous to the Feudal incidents required of the tenants before the seventeenth century in England. Since individuals have not been able to work out their own solution on their obligations to society, it becomes necessary for the State to subject their property to certain uses for the benefit of the general public. The imposition of these obligations will still be governed by the requirements of the constitutions, treaties, statutes and judicial decisions which comprise the law of the land.

In the field of mortgage foreclosures, there has been much discussion recently covering changes which might be made so as to be more beneficial to the mortgagor. Suggestions have been made that deficiency decrees resulting from foreclosure sales where the property brings an inadequate price should be abolished: *Mac Chesney & Leesman* "Mortgage, Foreclosures and Reorganizations" (1936) 31 Ill. Law. Rev. 287, 315.[1] Such a step would be an encroachment on the mortgagee's interest by removing one remedy which he had against the mortgage debtor. Since this particular remedy was given by statute, however, the legislature should have the power to remove it. The advisability of this change can only be determined when the efficacy of the deficiency decree is considered. It is to be doubted that many deficiency decrees are satisfied in full as the land is considered the primary source from which the debt is to be paid. The deficiency decree penalizes the mortgagor for a change in the value of the property even though he was not responsible for the changed value. Another suggestion with reference to mortgage foreclosures is a shortening of the period within which the mortgagor may redeem the property from the sale. This would benefit the mortgagee rather than the debtor. Along the same line, the Federal Government has not only entered the field of mortgage financing in an attempt to relieve distressed house owners but it has also entered the house building field with the National Housing Act. State Governments, as well, have attempted to cure the evil of poor housing with statutes providing for governmental supervision of such an activity: See Ill. State Bar Stats. (1935), Chap. 67a, Housing.

The Federal Government has recently passed another act which is reputed to avoid the charge that the Government is competing with private enterprise in the housing field.

A new statute affecting the interests of debtors may be found in the Chandler amendment to the Bankruptcy Act. This is an attempt to broaden the jurisdiction of the bankruptcy courts and, in that way, to give further aid in the solution of the complex problems presented.

The emphasis which is desired in all of the instances cited is that the interests of persons in property are continually changing. The present trend denotes a departure from the settled view of property by a process of socialization. The objects of the individual have been subordinated to a certain extent to the general welfare. Private ownership has by no means disappeared. It has, however, undergone considerable change. It is being limited in value. The situation demands careful consideration by the Bar and the public. And vigilance by the property owners of the Nation.

1. Also *MacChesney* and *Leesman* "The Mortgage Foreclosure Problem," XXIII A.B.A. Journal 41 (Jan. 1937).

London Letter

Matrimonial Causes.

THE Marriage Bill, referred to in the London Letter of March, 1937, received the Royal Assent on the 30th July last, after its title had been changed, in the House of Lords, to Matrimonial Causes Act. In its progress through both Houses the bill was subject to considerable discussion and many speeches were made both for and against. It is seldom, too, that the passage of any enactment has been watched with such interest by the "man in the street" as was evinced on all occasions when the measure was under consideration. It is the only Matrimonial Causes Act since that passed in 1873 which proclaims its object in the preamble, where it is stated that "it is expedient for the true support of marriage, the protection of children, the removal of hardship, the reduction of illicit unions and unseemly litigation, the relief of conscience among the clergy, and the restoration of due respect for the law, that the Acts relating to marriage and divorce be amended." A preamble is not a substantive part of a statute. Its proper function is to explain the intention of the legislature and the ground and cause of making the statute, or, as Coke puts it in his "Institutes" (vol. i, 79a) "the rehearsall or preamble of the statute is a good meane to find out the meaning of the statute, and as it were a key to open the understanding thereof."

Some amendments were made in the bill as originally introduced and the Act in its final form provides that no petition for divorce shall be presented to the High Court unless three years have passed since the date of the marriage, but a Judge of the High Court may, upon application being made to him in accordance with rules of Court, allow a petition to be presented before three years have passed on the ground that the case is one of exceptional hardship suffered by the petitioner or of exceptional depravity on the part of the respondent. The Act does not state in express terms whether the three years are to be reckoned as from the date upon which it comes into force or whether a petition for divorce may be based upon desertion for three years prior to that date, but it is generally held that this provision must be retrospective. Grounds for divorce under the Act are adultery, desertion without cause for a period of at least three years, cruelty and incurable insanity. A petition may be presented by the wife on the ground that her husband has, since the celebration of the marriage, been guilty of rape, sodomy or bestiality. Habitual drunkenness and imprisonment under a commuted death sentence as grounds for divorce, were dropped from the Bill. The Act provides new grounds for a decree of nullity, and relief for clergy of the Church of England and of the Church in Wales. It comes into operation on the 1st January, 1938.

The Bill which was introduced in the House of Lords to provide additional grounds for divorce in Scotland was dropped.

Another Act passed during the last session, dealing with matrimonial causes, which came into operation on the 1st October, was the Summary Procedure (Domestic Proceedings) Act, 1937. It gives effect to certain recommendations of the Departmental Committee set up to inquire into the special services of Courts of Summary Jurisdiction and provides that these

domestic cases may be dealt with in greater privacy, so that efforts at conciliation may have a better chance of success. Courts of summary jurisdiction constituted under the Act consist of not more than three justices of the peace, and will include, as far as is practicable, both a man and a woman. During the hearing of cases by the Court all persons will be excluded from the Court except members and officers of the Court; the parties concerned in the case, their solicitors and counsel; witnesses and other persons directly concerned; persons whom either party desire to be present; solicitors and counsel in attendance for other cases; newspaper representatives, and any other person whom the Court may permit to be present. During the taking of evidence of an indecent character the Court has power to exclude all persons not directly concerned in the case. The publication of particulars in newspapers in relation to any domestic proceedings before the Court is limited to the names, addresses and occupations of the parties and witnesses; the grounds of the application and a concise statement of the charges, defences and countercharges; submissions on any point of law and the decision of the Court thereon; the decision of, and observations made by, the Court in giving its decision. Technical papers for circulation among members of the legal or medical professions are excluded from these provisions. The duties of probation officers in connection with attempts to effect a conciliation between the parties to proceedings under the Act, have been extended. Where any party to proceedings is not legally represented and it appears that such party is unable effectively to examine or cross-examine a witness, the Court has power to put to the witness such questions in the interest of that party as may appear to be proper.

Divorce and the Courts

The number of divorce suits set down for hearing at the beginning of the Michaelmas term, which commenced on the 12th October, was the largest ever known in the history of the Court. There were 1,962 of which 1,351 are undefended petitions. These figures far exceed those for the Michaelmas term 1936, when there were 1,595 suits. There are three Judges of the Probate, Divorce and Admiralty Division, Sir Boyd Merriman, the President, Mr. Justice Langton and Mr. Justice Bucknill, and it is no light task which faces them. It is generally believed that when the new Matrimonial Causes Act is in full operation the number of actions in this division will be still further greatly increased and it is intended to introduce a bill in the House of Commons early in the session to provide for the appointment of two additional judges in this Division to cope with them. It is even contemplated that additional Court space will be necessary, but this cannot be ascertained until the Act has been in operation for some time.

New Recorder of London.

Judge Gerald Dodson has been elected to succeed Sir Holman Gregory in the office of Recorder of the City of London. The election was made at a special meeting of the Court of Aldermen and the appointment has been sanctioned by the Lord Chancellor. Judge Dodson has been Judge of the Mayor's and City of London Court since 1934. He was called to the Bar at the Inner Temple on the 24th April, 1907, and is 53 years of age.

The Birkenhead Dining Club.

At Gray's Inn, in the nineties, an effort was made to increase the social and corporate life among the members of the Inn by the formation of what was then known as the Bacon Club, the members of which dined together once a week, except during dining term and the Long Vacation. The meetings continued for some years but eventually came to an end. The happy intercourse engendered by the promotion of the Club however has not been forgotten, and steps have recently been taken to revive this method of still further cementing the close comradeship which has always existed between members of that Inn. A new club has been formed, to be known as The Birkenhead Dining Club, which, in the words of its promoters "will provide a pleasurable meeting ground for members of Gray's Inn . . . and keep alive the fame and achievements of the distinguished Bencher whose title is linked with it." The inaugural meeting of the club was held at the Waldorf Hotel on the 8th July last. The chair was taken by Mr. E. H. Butcher, who has been elected first president of the club, and the guest of honour was Lord Atkin, the Master Treasurer of Gray's Inn. The president announced that there would be no speeches, except that by their distinguished visitor, and after extending a hearty welcome to all the guests he called upon Lord Atkin to propose the toast "The memory of Lord Birkenhead."

Lord Atkin said that it was a pleasure and a privilege to him to propose the toast. It was an inspiration that had led somebody to promote the dining club, and it was a very happy thought that had led them to associate it with the name of the greatest man that had ever been connected with Gray's Inn—at any rate since Lord Bacon. He went on to outline the career of Lord Birkenhead and recalled his vivid personality. In referring to Birkenhead's appointment as Lord Chancellor at the early age of 46, which was very young in contrast with the ages of Law Lords of that day, Lord Atkin told an amusing story of an Australian Attorney-General who, in the days before Lord Birkenhead's Chancellorship, was conducting an appeal before the Privy Council. After four o'clock on the first day he was asked how he was getting on, and replied, "Well, I think that the three blind ones are with us, but the two deaf ones are against us."

Under Treasurer of Gray's Inn.

On the 30th September, 1937, the Hall of Gray's Inn was crowded with members of that Society, assembled to bid farewell to Mr. Dennis W. Douthwaite, and to invite his acceptance of tokens of good wishes on his relinquishing the long service to the Inn of fifty years, thirty-eight of them in the important position of Under-Treasurer. The presentation, which consisted of an album containing the autographs of 500 members of the Inn, a gold watch, and two silver entrée dishes suitably inscribed, was made by Mr. J. K. F. Cleave, Recorder of Tiverton. In making the presentation Mr. Cleave said that the gifts had been selected as an expression of their recognition of the zeal and efficiency which Mr. Douthwaite had always bestowed on the many duties pertaining to the office he was vacating, and added that there were few there who had not at some time received some signal service from him. Special reference was made to the volume containing the 500 signatures which, Mr. Cleave said, were those of some of the members who regarded Mr. Douthwaite with respect and affection. Mr. Douthwaite, replying, said that Gray's Inn was a place of great traditions and the Masters of the Bench had adhered to the tradition of fair and generous dealing towards the servants of that

house. He could assure all present that he would go away a very proud, grateful and happy man, carrying with him memories and keepsakes which he would treasure as long as he lived. Mr. S. W. Bunning, chief clerk, succeeds Mr. Douthwaite as Under-Treasurer.

The office of Under-Treasurer of an Inn of Court is a very responsible one. He is the Chief permanent Official and, under the direction of the Master Treasurer (who holds office for one year) is responsible for all affairs of the House. Among other things he attends all meetings of the Bench and records the minutes of proceedings, receives all moneys payable to the Inn, arranges for the letting of chambers, the collection of rents, and the upkeep of the property and attends to the formalities attached to the admission of students to the Inn and their call to the Bar. The office of Under-Treasurer, or Steward as he was sometimes called, is of considerable antiquity in the Inns of Court and dates back certainly to the early part of the sixteenth century.

REPORT OF THE JUDICIAL CONFERENCE AT WASHINGTON

THE Judicial Conference provided for in the Act of Congress of September 14, 1922 (U. S. Code, Title 28, sec. 218), convened on September 23, 1937, and continued in session for three days. The following Senior Circuit Judges were present in response to the call of the Chief Justice:

First Circuit, Senior Circuit Judge George H. Bingham.

Second Circuit, Senior Circuit Judge Martin T. Manton.

Third Circuit, Senior Circuit Judge Joseph Buffington.

Fourth Circuit, Senior Circuit Judge John J. Parker.

Fifth Circuit, Senior Circuit Judge Rufus E. Foster.

Sixth Circuit, Senior Circuit Judge Charles H. Moorman.

Seventh Circuit, Senior Circuit Judge Evan A. Evans.

Eighth Circuit, Senior Circuit Judge Kimbrough Stone.

Ninth Circuit, Senior Circuit Judge Curtis D. Wilbur.

The Senior Circuit Judge for the Tenth Circuit, Judge Robert E. Lewis, was absent, and his place was taken by Circuit Judge Orie L. Phillips.

By Act of Congress of July 5, 1937, provision was made for representation in the Conference of the United States Court of Appeals for the District of Columbia. As the Chief Justice of that Court was unable to be present, Justice D. Lawrence Groner attended in his stead.

The Attorney General and the Solicitor General, with their aids, were present at the opening of the Conference.

State of the Dockets.—Number of Cases Begun, Disposed of, and Pending, in the Federal District Courts.

The Attorney General submitted to the Conference a report of the condition of the dockets of the district courts for the fiscal year ending June 30, 1937, as compared with the previous year. Each Circuit Judge also presented to the Conference a detailed report, by districts, of the work of the courts in his circuit.

The report of the Attorney General disclosed the following comparison of criminal and civil cases (exclusive of bankruptcy cases) commenced and terminated during the fiscal years 1936 (as revised) and 1937:

	Commenced		*Terminated*	
	1936	*1937*	*1936*	*1937*
Criminal	35,920	35,369	36,396	35,351
Civil	39,391	32,672	41,384	37,393

The summaries show a considerable decrease in the total number of cases pending on June 30, 1937, in the district courts. This is true not only of the entire number but also of the totals in each general class except in criminal cases where the number of pending cases is slightly increased:

Pending Cases	*1936*	*1937*
Criminal Cases	10,993	11,011
United States civil cases	14,045	12,623
Private suits	31,294	27,995
Bankruptcy cases	62,527	54,802
Total	118,859	106,431

In accordance with his practice in recent years, the Attorney General submitted to the Conference tabulations showing the approximate time required to reach the trial of cases after joinder of issue in the several district courts. These tabulations indicate that important progress has been made. This is shown by the greater number of districts in which trial dockets are stated to be current, that is, where all cases in which issue has been joined and which are ready for trial are disposed of not later than the term following the joinder of issue, except cases continued at the request of counsel. In the fiscal year 1934, there were only 31 districts of which that could be said; in 1935, 46 districts; and in 1936, 51 districts. The Attorney General's present report shows that the work of the district courts is thus current in 68 of the 84 districts, exclusive of the District of Columbia. The Attorney General further shows that the same condition prevails in some divisions of four other districts and as to certain types of business in five other districts. In some of the districts, equity cases may be tried even between terms, if ready.

Of the districts in which trial dockets are in arrears—seventeen in all, including the District of Columbia—it appears that there are seven where the trial dockets are one to six months in arrears, and seven others where the trial dockets are between six months and a year in arrears. In the remaining three districts,

as pointed out by the Attorney General, the worst conditions appear,—to wit, in the Eastern District of Michigan where the equity trial docket is two years, and the law trial docket is ten months, in arrears; in the Western District of Washington in which the equity trial docket is three to four months, and the law trial docket is fifteen months, in arrears; and the District of Columbia in which the trial dockets are sixteen months in arrears.

This survey indicates clearly that the question of delays in the trial of cases after joinder of issue is one that should be considered with respect to particular districts and affords no just ground for general criticism of the work of the district courts. And in the few districts where serious delays occur the special conditions obtaining should not be overlooked.

It should also be noted that important improvement has been secured in certain districts which have heretofore presented the most serious delays. Thus, the Conference in recent years has had occasion repeatedly to call attention to the congestion and delays in Southern District of New York. It now appears, by the Attorney General's report, that the average interval between joinder of issue and trial in ordinary course in that district has been reduced from eighteen to two months in actions at law and from twenty to four months in equity.

The Attorney General has emphasized the presence of other sources of delay than merely the interval between joinder of issue and trial. He directs attention to the pendency of motions to dismiss, demurrers, and preliminary matters which frequently postpone joinder of issue. He states that his studies show that in many districts motions are heard only once a month and sometimes only on the first day of the term. This matter was considered by the Conference and will be taken up by the Senior Circuit Judges with respect to each district within their circuits, and it is believed that in this way appropriate provision may be made to expedite the hearing and decision of preliminary questions which may arise prior to joinder of issue and whatever delays may now be due to lack of such provision may be avoided.

Another source of delay pointed out by the Attorney General is the multiplication of places of holding court. It is quite obvious that this is an obstacle in the way of the speedy disposition of cases. It is also obvious that it may be difficult to secure a reduction in view of the local interests affected. However, this cause of delay is attributable not to the federal judges but to mandatory requirements of statutes. In many instances these requirements were imposed at a time when there were difficulties in transportation which no longer exist. The Conference is of the opinion that this question should receive the careful consideration of Congress to the end that the district judges should be relieved of the duty of holding court in more places than are reasonably necessary. The Attorney General recommends the enactment of legislation providing for the transfer of cases from one division to another, or from one place of holding court to another within the district, in order to make it possible for a case to be tried at the first term of court held at any place within the district. It may be possible to attain the desired end to a considerable extent by the action of the judges without legislation, but, so far as legislation may be found to be necessary, the Conference approves the recommendation of the Attorney General in principle.

Provision for Additional Judges in the Circuit Courts of Appeals.

The reports of the Senior Circuit Judges show that in general the Circuit Courts of Appeals are well up with their work. In six of the circuits and in the Court of Appeals for the District of Columbia, no additional judges are now required. It should be noted, however, that in the Eighth Circuit, the Court of Appeals is able to keep abreast of its work only through the aid of retired judges, of whom there are three. There is no certainty as to the length of time this aid will be available and if, in the future, it should be seriously lessened, the business of that court would require another judge.

The Circuit Court of Appeals for the Second Circuit is up with its work but in view of the severe and disproportionate burden imposed upon its members by its heavy docket, an additional circuit judge is thought to be necessary.

The Circuit Court of Appeals for the Fifth Circuit is also fully up with its work but it is faced with a probable increase of business and in view of the extent of the present and future burden upon the court, it is felt desirable to have an additional circuit judge.

The Circuit Court of Appeals for the Sixth Circuit is not able with the present number of judges to hear all of the cases as promptly as they should be heard and an additional circuit judge is necessary.

While the Circuit Court of Appeals for the Seventh Circuit has been able to dispose of its cases, it has been handicapped by the delay in filling vacancies, one of which still remains. The court has been compelled to rely upon the constant assistance of district judges. It is the sense of the Conference that it should not be necessary for a Court of Appeals to call in district judges except in some exigency for a temporary period. Even with the filling of the existing vacancy, the Court of Appeals of the Seventh Circuit would still be lacking in a sufficient number of circuit judges to keep abreast of its work and the appointment of an additional circuit judge is needed.

Accordingly, the Conference recommends that provision be made for an additional circuit judge in the Second, Fifth, Sixth and Seventh Circuits, respectively.

Provision for Additional District Judges.

The Conference gave close consideration to the extent of the need for additional district judges, having regard to the volume and character of the work of the district courts and appropriate provision for the prompt disposition of cases.

In 1936, the Conference recommended that additional judges be provided as follows:

1 additional district judge for the Northern District of Georgia; 1 additional district judge for the Eastern District of Louisiana; 1 additional district judge for the Southern District of Texas; 1 additional district judge for the Western District of Washington.

It will be observed that the last mentioned district is one of the two districts (aside from the District of Columbia) to which the Attorney General has directed special attention as showing serious arrearages. For this district as well as for the others, embraced in the recommendation of the Conference last year, no additional judges have yet been provided.

The Conference renews its recommendation as to the four districts above mentioned.

In past Conferences, it had been hoped that there would be an improvement in the state of the trial dockets in the Eastern District of Michigan, but this hope has not been realized and in view of the arrearages,

specially mentioned in the report of the Attorney General, the Conference recommends that provision be made for an additional judge.

Because of special conditions in the District of Kansas, the Conference has concluded that an additional judge is needed there.

Other increases are found to be advisable in the Southern District of California, the Western District of Louisiana and the Northern District of Ohio.

In the District of Columbia special conditions demand consideration. In this District, the courts have not only the important federal cases committed to their jurisdiction, but also the cases which within a State would fall within the jurisdiction of state courts. As, prior to this year, the statute had not provided for the representation of this District in the Conference, Justice Groner presented statistics applicable to a period of seven years. In view of the increasing number of cases and the impossibility of bringing the dockets up to date with the present judicial force, and having regard to the character of the work and the future needs of the District, the Conference recommends that provision be made for three additional judges for the District Court for the District of Columbia.

Including the recommendations made last year and now renewed, the Conference therefore recommends that additional district judges be provided as follows:

1 additional district judge for the Northern District of Georgia; 1 additional district judge for the Eastern District of Louisiana; 1 additional district judge for the Western District of Louisiana; 1 additional district judge for the Southern District of Texas; 1 additional district judge for the Eastern District of Michigan; 1 additional district judge for the Northern District of Ohio; 1 additional district judge for the Western District of Washington; 1 additional district judge for the Southern District of California; 1 additional district judge for the District of Kansas; 3 additional district judges for the District of Columbia.

In the remaining seventy-five districts, it is the opinion of the Conference that no additional district judges are now required.

The Conference is also of the opinion that the present method of assigning judges to meet temporary emergencies is adequate.

Boundaries of Judicial Districts and Circuits.

In view of the pending inquiries by committees of the Senate and of the House of Representatives, respectively, which have been appointed to study the organization and operation of federal courts, it seemed to the Conference that it was probable that the boundaries of existing districts and circuits would become the subject of consideration. In order to provide the means for suitable collaboration in the examination of that subject, the Conference appointed the following committee to cooperate with the congressional committees, to wit, Judges Manton, Foster, Wilbur and Phillips, the Chief Justice being authorized to add to the committee from time to time.

Appointment of Counsel for Indigent Defendants in Criminal Cases—Public Defender.

The Attorney General brought to the attention of the Conference the subject of proper representation for indigent defendants in criminal cases and the following resolution was adopted:

"We approve in principle the appointment of a Public Defender where the amount of criminal business of a district court justifies the appointment. In other districts the district judge before whom a criminal case is pending should appoint counsel for indigent defendants unless such assistance is declined by the defendant. In exceptional cases involving a great amount of time and effort on the part of counsel so assigned, suitable provision should be made for compensation for such service, to be fixed by the court and to be a charge against the United States."

Amendment of Section 25 of the Bankruptcy Act.

At the Conference last year a committee was appointed to consider the advisability of amending Section 24b of the Bankruptcy Act with respect to appeals. Upon receiving the report of that committee, and after considering the various questions raised in the discussion, the Conference adopted the following resolution:

"Resolved: That in the opinion of this Conference Section 25 of the Bankruptcy Act should be amended so as to permit consideration by the Circuit Courts of Appeals and by the United States Court of Appeals for the District of Columbia of appeals which have not been properly applied for or allowed because of mistake as to the applicable section of the statute relating to appeals in such cases. We suggest that the following subsection be added to the statute as Subsection 25 (d), viz:

"(d) In any case where an appeal which is allowable only in the discretion of the appellate court under Subsection 24 (b) hereof has been allowed under Subsection 24 (a) or 25 (a), or where an appeal which is allowable only under Subsection 24 (a) or 25 (a) has been applied for under Subsection 24 (b), the appellate court before which such appeal or application is pending may in its discretion allow or entertain the appeal, notwithstanding the error in procedure, and may review the order or decree appealed from as though the proper procedure for obtaining a review of same had been followed, provided the appeal has been allowed or the application for the allowance of appeal has been filed within thirty days of the entry of the order or decree which it is sought to review."

Appointment of Official Stenographers.—The Conference in 1936 adopted the following resolution:

"Resolved that it is the sense of the Conference that provision should be made for the appointment of official stenographers for the reporting of trials in the district courts. It is not necessary that salaried offices be created. The need would be met by an act authorizing the district judge of each judicial district to appoint one or more official court stenographers for that district, and to fix by rule of court the compensation which such stenographers shall be entitled to charge for their services, with provision that amounts properly paid by parties for the service of such stenographers be taxable as costs in the case in the discretion of the trial judge."

At the present session the Conference renewed this recommendation.

H. R. 4721.—The Conference adopted the following minute in relation to this measure:

"The attention of the Conference has been called to H. R. 4721 now pending in the Congress.

"The purpose of this bill is to require that in all cases, civil and criminal in the federal courts, as stated, the 'form, manner, and time of giving and granting instructions to the jury' shall be governed by the 'law and practice in the state courts of the

state in which such trial may be had'. The result of the enactment of this bill will be to change the practice in the federal courts respecting the charging of juries in varying degrees in a large number of states. In many it will result in changing federal trial judges from active instruments of justice to mere referees of contests between opposing counsel. It will deprive the juries of the benefit of the learning and experience of the trial judge in the determination of issues of fact. Even the most honest and intelligent juries need and welcome the trial judge's aid in performing their often difficult duties so that they may arrive at a fair and impartial verdict and do full justice between the parties.

"One of the outstanding excellencies of the federal courts in accomplishing justice is the right and duty of the federal judge to charge juries in a manner which will be most helpful to them in arriving at just verdicts, a feature of federal practice of especial importance in criminal cases in the interests of both the Government and the defendant. Many decisions of the United States Supreme Court, as well as of the Courts of Appeals, have carefully laid down such limits as are necessary to prevent any encroachment upon the province of the jury by a judge in his charge, and such limitations are carefully enforced. Thus controlled, the long established and well-working present method of charging juries in federal courts should, in the opinion of the Conference, be continued. In expressing this opinion the Conference has not taken into consideration any questions of constitutional validity, and expresses no opinion thereon.

"The bill would substitute a practice which in state jurisdictions is gradually being abandoned. A notable instance is a recent constitutional amendment in California adopting the federal practice respecting charging juries in the courts of that State.

"We respectfully call this bill to the attention of the Attorney General and earnestly urge him to oppose its enactment."

Rules of Civil Procedure for the District Courts of the United States.

The Conference availed itself of the opportunity to consider the draft of the Rules of Civil Procedure prepared by the Advisory Committee appointed by the Supreme Court. Various questions were raised and discussed, to the end that the Supreme Court should have the advantage of the views of the members of the Conference.

The Conference adjourned subject to the call of the Chief Justice.

For the Judicial Conference:

CHARLES E. HUGHES,
Chief Justice.

September 28, 1937.

Section of Judicial Administration Launches Program

(*Continued from page 6*)

likewise must be constantly adjusted to the needs of the time.

These problems of judicial administration are a challenge to the capacity of the bar. They are a challenge to every lawyer. Every lawyer who desires to help is urged to communicate with the appropriate member of the Associate and Advisory Committee from his own state. Tentative outlines of a report are due from the general committee chairman January 31st. As I said at the outset, we are working on a time schedule. If you desire to help, the time to do so is now. The presentation of the reports of the committees, in conjunction with the celebration of the completion of the Federal Court Rules, should be one of the outstanding events of the annual meeting at Cleveland.

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BERT M. KENT, Cleveland	Section of Patent, Trademark and Copyright Law
GEORGE R. MURRAY, Dayton	Ohio State Bar Assn.
WALTER S. RUFF, Canton	Ohio State Bar Assn.
MURRAY SEASONGOOD, Cincinnati	Section of Munic. Law
MORISON R. WAITE, Cincinnati	Ohio State Bar Assn.
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A. W. TRICE, Ada	State Bar of Oklahoma
OREGON	
BLAINE HALLOCK, Baker	Oregon St. Bar Assn.
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HENRY S. DRINKER, JR., Philadelphia	Philadelphia Bar Assn.
CHARLES H. ENGLISH, Erie	Pennsylvania Bar Assn.
JOSEPH W. HENDERSON, Philadelphia	Board of Governors and State Delegate
HARRY S. KNIGHT, Sunbury	Board of Governors
BERNARD J. MYERS, Lancaster	Pennsylvania Bar Assn.
ARTHUR M. SCULLY, Pittsburgh	Pennsylvania Bar Assn.
RHODE ISLAND	
JAMES C. COLLINS, Providence	State Delegate
CHAUNCEY E. WHEELER, Providence	Rhode Island Bar Assn.

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GEORGE L. BUIST, Charleston	State Delegate
ALBERT C. TODD, Greenwood	South Carolina Bar Assn.
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CARL B. RIX, Milwaukee	State Delegate
WYOMING	
JOHN D. CLARK, Cheyenne	Wyoming St. Bar Assn.
WILLIAM O. WILSON, Cheyenne	State Delegate
TERRITORIAL GROUP	
L. DEAN LOCKWOOD, Manila	State Delegate

NOTE.—The Chairman of each Standing and Special Committee of the Association shall have the privilege of the floor in the House of Delegates, but shall have no right to vote as such Chairman. (Constitution, Article V, Section 11.)

CURRENT EVENTS

(*Continued from page 3*)

guilty of fraud, as to investors relying on such balance sheet, in the absence of an intent to conceal accompanying the acts of omission.

Thus is shown the ineffectiveness of a balance sheet to render very much actual protection to the far-flung ultimate investor—the great "unwept, unhonored and unsung."

A procedural point of interest was where it was noted that requests handed up by the appellants numbered 82; that their assignments of error involved 40 alleged refusals to charge as requested, although they had failed to point out any errors in the charge as given; and then the opinion of the Circuit Court continued: "In the federal courts the doctrine is firmly established that exceptions should be specifically taken so that the trial judge may have an opportunity to reconsider the matter and remove the ground of exception. Where the exceptions are not specific, an appellate court is under no duty laboriously to relate each of the requested instructions to the charge as given, in order to determine that no error was committed."

The Court concluded: that the trial had been entirely fair to the appellants; that a clear and accurate charge had been delivered under which the jury might well have found a verdict for the plaintiffs; that, although there was much in the evidence which tended to cast doubt on the good faith of the accountants, it did not persuade the jury; that, finding no error in the charge as

given and nothing clearly wrong in refusing requested instructions, the judgment of the trial court should be affirmed; and that "An appellate court cannot set at naught a jury's verdict merely because they might have reached a different conclusion had they been sitting as a jury."

To Extend Direct Appeal Privilege to States

Where the constitutionality of acts of State Legislatures is questioned in litigation in Federal courts, States may be accorded rights similar to those given the Federal Government where the constitutionality of acts of Congress is questioned, if S. 3069, introduced by Senator Adams, of Colorado, is passed. This bill provides for intervention by the States, and for direct appeals to the Supreme Court of the United States in such cases. It would require a notice to the State's Attorney General in order to permit him to intervene on behalf of the State. The basis of the Federal right of intervention and direct appeal where the constitutionality of acts of Congress is questioned is, of course, Public Law No. 352, 75th Congress, U. S. C. A. Current Service pamphlet No. 7, Laws of 1937, p. 716.

H. O. L. Co's Foreclosures

Procedure under State foreclosure laws has been found unsatisfactory, so it develops from the appearance before the House Banking and Currency Committee of Abner H. Ferguson, General Counsel of the Federal Housing Administration. The Administration is making a study of methods by which foreclosure fees may be reduced.

It is said that the H. O. L. C. already has developed ways of getting around high fees in foreclosure cases in the State of New York, but that as a result its title to property is being questioned. A recent amendment of the Manual by the Federal Home Loan Bank Board extends authority to State Managers of the Home Owners' Loan Corporation, under certain conditions, to accept deeds in lieu of foreclosures. The section as amended reads:

"Sec. 605 (j). Deeds in lieu of foreclosure may be accepted from owners of mortgaged properties in settlement of the indebtedness owing to the Corporation, and in connection with such acceptance each Regional or State Manager is authorized, in his discretion and with the approval of the Regional or State Counsel, to expend funds to satisfy, remove, release or acquire intervening liens or rights. No sum shall be paid to any owner of the property, but as a part of the consideration for such deed an owner may be permitted to continue in possession of the premises for a limited time within the discretion of the Regional or State Manager under advice of the Regional or State Counsel. The authority herein granted shall be exercised under procedure and limitations promulgated by the General Counsel with the approval of the General Manager."

A bill, H. R. 8622, introduced by Representative William B. Barry, of New York, would prevent deficiency judgments being taken by the Home Owners' Loan Corporation in foreclosures "in excess of the actual amount of costs incidental to the proceedings"; would limit the Corporation to "recourse against the mortgaged property only"; and would abolish all personal and deficiency judgments which it heretofore has taken. This provision for abolishing such judgments already taken is a point of additional relief beyond that proposed in a bill, S. 1678, by Senator Copeland last February during the regular session.

Continuous Tax Study

A United States Tax Commission would be created by the bill, S. 3070, introduced by Senator James J. Davis, of Pennsylvania. It would be the function of the Commission continuously to study the Federal and State tax structures for the purposes of simplification of administration, allocation of special fields between the Federal Government and the States, and such redistribution of the tax burdens as might be desirable.

News of the Bar Associations

Illinois State Bar Association Holds Mid-Year Meeting Which Demonstrates Effectiveness of Section Form of Organization in Stimulating Interest and Attendance—Close Contact of Officials with Sections—Younger Member Activities Much in Evidence—Addresses, Etc.

WITH more than one thousand lawyers and their guests in attendance, the Mid-Year meeting of the Illinois State Bar Association, held at Chicago on Friday, November 19th, afforded a most convincing demonstration of the effectiveness of the section organization in stimulating interest of the members in the work of a state association. From the standpoint of attendance and program interest, the meeting was one of the best in recent years.

Getting off to an early start, the officers and members of the board of governors of the Association held an informal breakfast meeting, at which time the program for the day was discussed and each member of the board directed to attend the meeting of the section to which he had been previously assigned, so that he might report on its program at a subsequent meeting to be held on the next day.

At nine-thirty o'clock, nine sections convened for their meetings, including the sections on criminal law, probate and trust law, civil practice and procedure, insurance law, patent, trademark and copyright law, public utilities, legal education and admission to the bar, professional relations and younger members activities. Each section had arranged an attractive discussion program, and every meeting was well attended.

Outstanding features of the morning program included the discussion of recent amendments to the Supreme Court rules, led by Chief Justice Paul Farthing, who answered questions on the new amendments and invited further suggestions for needed revision of these rules; a discussion of the recent Illinois prison survey, led by Henry Barrett Chamberlin, secretary of the Chicago Crime Commission; a discussion of the patent legislation approved by the American Bar Association House of Delegates; interesting reports on rural electrification and the Motor Carrier's Act; discussion of recent amendments to the requirements for admission to the Illinois bar; comment on the plan for elimination of unauthorized practice of law through annual registration of lawyers; and reports on the activities of younger members of the Association in cooperation with the American Bar Association Junior Bar Conference.

During the noon hour, lawyers and their guests gathered at the luncheons for law school alumni, with separate meetings being held for the Chicago-Kent, Columbia, DePaul, Illinois Wesleyan, John Marshall, Loyola, Northwestern, University of Chicago, University of Illinois, University of Michigan and Yale alumni groups. More than four hundred lawyers attended these luncheons, with special programs being presented at a number of the gatherings. These luncheons were arranged by the section on younger members activities.

At two o'clock in the afternoon, seven sections gathered for afternoon meetings, including the sections on real estate law, state statutes, taxation, corporation law, municipal law, law office management and public relations. High points in the afternoon programs were Nathan William MacChesney's discussion of the function of the lawyer in real estate deals; Sterling Morton's discussion of federal tax legislation and Judge Edmund K. Jarecki's recommendations with regard to revision of state tax laws; a discussion of revision of state securities laws, led by Calvin D. Trowbridge; discussion of problems in municipal law by outstanding speakers; consideration of uniform fees for masters-in-chancery; and a discussion of improvement of public relations and publicity for the bar, by Judge John Gutknecht.

At three o'clock, teams representing the junior bar associations at DePaul university and the University of Chicago met in first round arguments in the annual Moot Court Competition sponsored by the section on younger members' activities of the Illinois State Bar Association, with the University of Chicago winning the argument and the right to enter the finals against the winner of the Loyola-Northwestern contest to be held later. The University of Chicago is defending the title it won in this competition last year, and the contest was enthusiastically attended.

At six-thirty in the evening, the Chicago Bar Association and the Illinois State Bar Association joined in their annual dinner honoring the justices of the Supreme Court of Illinois, with President John F. Voigt of the state association presiding. During the dinner hour, the Chicago Bar Association glee club, under the direction of John D. Black, provided musical divertissement, with the lawyers and guests present joining in the chorus of the songs presented.

President Hayes McKinney of the Chicago Bar Association opened the speaking program with a brief word of greeting, following which Chief Justice Paul Farthing spoke on the subject, "May It Please the Court," dealing informally and entertainingly with presentation of cases to the Supreme Court of Illinois. Principal speaker of the evening was President Arthur T. Vanderbilt of the American Bar Association, whose address on "Whither the Bar?" was most favorably received.

At eight o'clock on Saturday morning, the board of governors again convened in a breakfast meeting at which time each member of the board presented a report on the section meeting which he attended on Friday, outlining not only the program presented but the scope of the general activities of his section. In this way all members of the board left the meeting with a clear picture of what every section is doing in carrying forward their various programs of activities. Perhaps as never before in the history of the Association, the officers and board of governors are now fully acquainted with the details of these various activities.

This close contact with the section organization not only enables the officials of the Association to keep in contact with their work, but gives to the sections the benefit of the suggestions of a group of officials who are conversant with the entire range of the Association's activities, thus making for greater coordination of effort and avoidance of duplication. In line with this closer contact, members of the board

are now studying on necessary reorganization of the section structure with a view toward improving its effectiveness and the adding on of new sections in which members of the Association have evidenced increasing interest.

The next meeting of the sections will be at Peoria, in February, at which time lawyers will join in the Lincoln Day dinner of the Peoria Bar Association. In April, the sections will meet at Springfield to draft their reports for the annual meeting, in May.

R. ALLAN STEPHENS,
Secretary.

Rhode Island Bar Association Holds Fortieth Annual Meeting—Meeting Approves Series of Thirty Broadcasts on Legal Subjects—New Rules for Disciplinary Action Sponsored by Association Approved by Supreme Court

THE Fortieth Annual Meeting of the Rhode Island Bar Association was held December 6, 1937 with 120 members present and President Frederick W. O'Connell presiding.

President O'Connell rendered a report of the major activities of the Association during the year. He called attention to the fact that the officers of the Association had attempted to secure approval by a second session of the Legislature of the Constitutional Amendment, sponsored by the Rhode Island Bar Association, whereby both the Supreme and Superior Courts would become Constitutional courts with Judges holding office during life or good behavior, after appointment by the Governor with the advice and consent of the Senate. This amendment may yet be approved by the 1938 session of the General Assembly and if so, it will be in order for final approval by the electorate at the November, 1938, elections. President O'Connell pledged the officers to work for its adoption.

The President also called attention to the fact that there had been certified to Congress, and particularly to the Senators and Representatives from Rhode Island, the result of the poll of this Association indicating that the members were opposed to the proposal of the President of the United States to change the formal structure of the Supreme Court of the United States, the opposition being registered by a vote of 273 to 18.

The President also called attention to the fact that new rules for disciplinary action against members of the Bar as sponsored by this Association had been adopted by the Supreme Court. Under these rules, an investigating committee of nine undertake investigation of complaints and decide whether they merit prosecution or not. If they decide that prosecution is indicated, one of the members of the committee is designated to prosecute the complaint before a hearing committee of five, also appointed by the Supreme Court, which committee in turn makes recommendations to the Court in relation to disciplinary action against the member of the Bar. As a result of this new standard of procedure, the Grievance Committee of the Rhode Island Bar Association has been discontinued, and a Committee on Ethics substituted for it.

The approval and commendation of the Association was given to the action of its Committee on Public Relations in sponsoring and arranging a series of thirty broadcasts of fifteen minutes each on Saturday evenings, during which subjects of interest to the people of the State of Rhode Island are discussed by prominent members of the Rhode Island Bar. It was the opinion of the President and the Public Relations Committee that these broadcasts are accomplishing good for the bench and bar of the State in making the functions of courts and lawyers better known to the public.

Approval was given to the recommendation of the Committee on American Law Institute for the continuance of annotation, at the expense of this Association, of each new Restatement of the Law as published.

The Committee on Professional Ethics recommended certain amendments to the Canons of Ethics of the Association in general conformity to those recently adopted by the American Bar Association, particularly in relation to lawyers' lists.

The Committee on the Unlawful Practice of the Law reported that it had recommended to the Supreme Court that a committee be appointed by that Court with authority to summon witnesses before it for the purpose of investigating the illegal practice of the law and that the Supreme Court had this matter under advisement.

President O'Connell and all the other officers of the Association were re-elected for another term of one year. They are as follows: President, Frederick W. O'Connell; First Vice-President, Herbert M. Sherwood; Second Vice-President, Henry C. Hart; Secretary, Fred B. Perkins; Treasurer, Andrew P. Quinn; Chairman Executive Committee, Henry M. Boss.

The Association's radio schedule above referred to started on October 23 with an address by Judge Charles A. Walsh on "How Lawyers Are Trained." It was given over Station WJAR Saturday evening at 7:45 P. M. Successive addresses through October, November

and December, 1937, over the same station every Saturday at 7:45 P. M. were as follows: October 30, "Your Lawyer's Duty to You," by William H. Edwards; November 6, "How to Be a Good Client," by Herbert M. Sherwood; November 13, "Rhode Island Courts," by Walter S. Reynolds; November 20, "What Probate Courts Do," by James C. Collins; November 27, "Federal Courts," by Charles P. Sisson; December 4, "Choosing Judges," by Governor Robert E. Quinn; December 11, "Following a Civil Case Through the Courts," by Thomas J. Flynn; December 18, "Criminal Justice," by Attorney General John P. Hartigan.

The program for 1938 is: January 1, "Serving on the Jury," by Assistant Attorney General John E. Mullen; January 8, "The Lawyer as a Peacemaker," by Arthur J. Levy; January 15, "The Daily Work of a Lawyer," by S. Everett Wilkins, Jr.; January 22, "Making Haste Slowly," by Thomas L. Marcaccio; January 29, "Legal Ethics," by James B. Littlefield; February 5, "If a Lawyer Goes Wrong," by Fred B. Perkins; February 12, "Ambulance Chasing," by Clarence N. Woolley; February 19, "Put It in Writing," by Joseph H. Gainer; February 26, "The Rhode Island Bar Association," by Frederick W. O'Connell; March 5, "Taxes," by James F. Armstrong; March 12, "Land and Buildings," by Judge Stephen J. Casey; March 19, "Mortgages," by Thomas P. Corcoran; March 26, "Making a Will," by George Hurley; April 2, "Marriage and Divorce," by Judge Leonidas A. Pouliot; April 9, "Accidents," by Judge Mortimer M. Sullivan; April 16, "What Is a Corporation," by Laurence J. Hogan; April 23, "The Constitution," by Daniel H. Morrissey; April 30, "The Legislature and the Law It Makes," by Eugene L. Jalbert; May 7, "City Functions and Ordinances," by Elmer S. Chace; May 14, "Complicated Laws," by Judge William W. Moss; and May 21, "Your Personal Constitutional Rights," by Ira Lloyd Letts.

FRED B. PERKINS,
Secretary.

Vermont Bar Association Holds Sixtieth Annual Meeting—President Black Speaks on "Professional Economics"—Public Relations Committee Appointed—Address on "The Constitution and Federal Administrative Justice", Etc.

THE Sixtieth Annual Meeting of the Vermont Bar Association was held in the National Life Insurance Company Building in Montpelier on October 5 and 6, 1937. A large percentage of the members attended and the meeting was very much enjoyed. The secretary's report showed a present membership of 326 or an increase of about 25% in the past ten years.

The Treasurer's report showed a strong financial condition of the Association.

The President's address, by Charles A. Black of Burlington, was on "Professional Economics" and discussed especially the large increase in new admissions to the Bar now taking place.

Col. O. R. McGuire, Chairman of the American Bar Association's committee on Administrative Law gave a scholarly and interesting address on "The Constitution and Federal Administrative Justices," in which he showed the present extent of bureaucracy and the need of additional law providing for review of administrative rulings.

A Memorial address on Henry B. Cushman was delivered by John W. Redmond of Newport, and a memorial address on Henry B. Shaw was delivered by Hon. Joseph T. Stearns of Burlington.

ARTHUR GRAVES
President, Vermont Bar Association

The usual committee reports were made including those by the Cooperating Committees working with the American Bar Association. Further provision for cooperating with the American Bar Association was made by appointing the Board of Managers a committee ex officio for this purpose.

Hon. Walter S. Fenton of Rutland, State Delegate to the House of Delegates and member of the Board of Governors of the American Bar Association gave a report on the last annual meeting and work of the American Bar Association.

A Public Relations committee was appointed with its duties left for the Board of Managers to outline. A committee was also appointed to consider the situation in the State as to Legal Aid.

The annual dinner on Wednesday evening was attended by over 200 members and guests. A very interesting program was offered, with after dinner talks by his Excellency Governor George D. Aiken, Mr. Justice Buttles

of the Supreme Court and Superior Judge Charles B. Adams. The principal address was by Hon. Frank J. Hogan of Washington, who told in his inimitable and very entertaining manner some of his experiences in court trials.

The following officers were elected for the ensuing year: President Arthur L. Graves, St. Johnsbury; Vice Presidents James P. Leamy, Rutland, Neil D. Clawson, Brattleboro, Horace H. Powers, St. Albans; Secretary, H. J. Conant, Montpelier; Treasurer, Webster E. Miller, Montpelier; Member of the Board of Managers, Paul A. Chase, Ludlow.

H. J. CONANT,
Secretary.

(*From Ohio Bar Bulletin, Dec. 27*)

On December 21st the Public Utilities Commission of Ohio adopted the following rule, effective at once

"(a) All persons practicing before the Public Utilities Commission of Ohio are required to be attorneys at law and entitled to practice law before the Supreme Court of Ohio.

(b) All persons desiring to practice before the commission must first present their names and licenses, or a certified copy thereof, to practice law in the State of Ohio for registration before they will be recognized by or permitted to practice before the commission."

At the Summer Meeting in 1936 the Ohio State Bar Association adopted the recommendation of its Committee on Unauthorized Practice of Law to the effect that since an appearance before the Public Utilities Commission in a representative capacity is practicing law within the meaning of *Goodman et al.* v. *Beall et al.*, 130 Ohio St. 427, because from the time an application is filed everything is part of the official record, the Public Utilities Commission be requested to restrict practice before the commission to attorneys at law. In compliance with the resolution the committee authorized its chairman, Joseph L. Stern of Cleveland, to draft a suggested rule and transmit the same to the commission. The rule adopted by the commission is identical with the one presented by Mr. Stern on behalf of his committee.

(*From New Jersey Law Journal*)

The General Council of the New Jersey State Bar Association, at a meeting held December 4, 1937, voted its approval of the proposed rules to be submitted to the Supreme Court for the integration of the New Jersey Bar.

The proposal, which has the wholehearted support of Arthur T. Vanderbilt, President of the American Bar Association, would become effective July 1, 1938.